Supreme Court, U.S.
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NO. 09-____ 08-933 JAN 13 2009

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IN THE

Supreme Court of the United States

PETER CHARTSCHLAA and ANGELA SAWICKI KING, as personal representatives of ALEX CHARTS, deceased, doing business as Alex Charts Agency, Inc. and Charts Insurance Associates, Inc.

Petitioners

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE LIFE INSURANCE COMPANY, NATIONWIDE PROPERTY AND CASUALTY COMPANY, NATIONWIDE VARIABLE LIFE INSURANCE COMPANY AND COLONIAL INSURANCE COMPANY OF CALIFORNIA

Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Jan. 13, 2009

QUESTIONS PRESENTED

1. Whether causes of action based on violations of the Connecticut Franchise Act, Conn. Gen. Stat. § 42-133e et seq. and the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et seq., are property of the Chapter 7 debtor and not the estate under this Court's decision in *Segal v. Rochelle* 382 U.S. 375 (1966) and 11 U.S.C. § 541(a)(1), when the violations occurred post-petition.

2. Whether the Second Circuit's decision improperly concludes that an award of damages consisting solely of projected post-petition earnings based on the post-petition personal services of the Chapter 7 debtor, are property of the estate, in derogation of 11 U.S.C. § 541(a)(1) and § 541(a)(6).

3. Whether the Second Circuit's decision, concluding that a Connecticut Corporation comes into existence prior to a certificate of incorporation being filed with the Secretary of State, impermissibly preempts State law which defines when a Corporation comes into existence (Conn. Gen. Stat. § 33-637(a)) and conflicts with this Court's holding in *Butner v. United States*, 440 U.S. 48 (1979).

4. Whether the Second Circuit's decision, concluding that a Chapter 7 trustee's intent to abandon an asset must be clear and unequivocal, in the context of a case in which there was notice and a hearing, establishes a new standard with respect to abandonment in derogation of 11 U.S.C. § 554.

5. Whether the Second Circuit's conclusion that the claim is property of the bankruptcy estate compelled it to

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LIST OF PARTIES TO THE PROCEEDING

The parties in the caption are the parties to this case.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Charts Insurance Associates, Inc. states that it has no parent companies or subsidiaries and no publicly held company owns 10% or more of its stock.

TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Peter Chartschlaa and Angela Sawicki King as personal representatives of Alex Charts, deceased, doing business as Alex Charts Agency, Inc. and Charts Insurance Associates, Inc., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, Pet. App. 1, reversing the decision of the District Court is reported at *Chartschlaa v. Nationwide Mutual Insurance Company*, 538 F.3d 116 (2d Cir. 2008).

The opinion of the District Court, Pet. App. 12, denying in part and granting in part respondents' motion for judgment as a matter of law or, in the alternative, motion for a new trial, granting petitioners' motion for attorney's fees, and denying petitioners' motion for prejudgment interest is reported at *Alex Charts and Charts Insurance Associates, Inc. v. Nationwide Mut. Ins. Co.*, 397 F. Supp. 2d 357 (D. Conn. 2005).

The decision of the District Court, Pet. App. 61, on remand from the Second Circuit, holding that the claims asserted by the petitioners are not property of the bankruptcy estate and the petitioners have standing to assert the claims, is reported at *Charts v. Nationwide Mut. Ins. Co.*, 300 B.R. 552 (D. Conn. 2003).

The decision of the Second Circuit, Pet. App. 74, vacating the District Court decision that adopted the recommendation of a United States Magistrate Judge that the matter be dismissed because, *inter alia*, the claims at issue were property of the bankruptcy estate of petitioner Charts and remanding with directions the estate be joined as a party is recorded at *Alex Charts and Charts Insurance*

Associates, Inc. v. Nationwide Mut. Ins. Co., 16 Fed. Appx. 44, 2001 WL 682459 (2d Cir. 2001).

The District Court's decision approving the recommended ruling of the Magistrate Judge, Pet. App. 78, is unpublished.

The recommended ruling of the Magistrate Judge, Pet. App. 82, granting the respondents' Motion for Summary Judgment, finding the claims at issue were vested in the bankruptcy estate of Mr. Charts is unpublished.

BASIS FOR JURISDICTION

The Second Circuit's decision sought to be reviewed was entered on August 14, 2008. The Second Circuit's order denying petitioners' Petition for Panel Rehearing and or Hearing En Banc was entered on October 15, 2008. The petitioners timely filed their petition for Writ of Certiorari by delivering it on January 13, 2009 to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS OF LAW

The following statutory provisions are relevant to this matter: 11 U.S.C. §§ 541(a)(1), 541(a)(6), 554(a); Conn. Gen. Stat. §§ 33-637, 42-110 et seq., 42-133e et seq.; pertinent text is set out in the appendix at Pet. App. 90-104.

STATEMENT

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1332, as there is complete diversity between the opposing parties.

This case is the subject of one unreported Order of the Second Circuit Court of Appeals, *Charts v. Nationwide Mut. Ins. Co., Inc.*, 16 Fed. Appx. 44, 2001 WL 682459 (2d

Cir. Jun 15, 2001) ("Charts I"), two reported decisions of the United States District Court for the District of Connecticut, *Charts v. Nationwide Mut. Ins. Co., Inc.*, 300 B.R. 552 (D. Conn. 2003) ("Charts II") and *Charts v. Nationwide Mut. Ins. Co., Inc.*, 397 F. Supp. 2d 357 (D. Conn. 2005) ("Charts III"), and one reported decision of the Second Circuit Court of Appeals, from which the Plaintiffs petition this Court for certiorari, *Chartschlaa, et al. v. Nationwide Mut. Ins. Co., Inc.*, 538 F.3d 116 (2008) ("Charts IV").[1] The claims underlying every element of this case stem from the wrongful termination by Nationwide Insurance Company of one of its most successful and prominent independent insurance agents, Charts Insurance Associates, Inc. and its president Alex Charts.

On December 20, 1978 Alex Charts entered into an Agent's Agreement with Nationwide Insurance. Mr. Charts' company, Alex Charts Agency, Inc. ("ACAI") signed Corporate Agency Agreements with Nationwide in 1987 and in 1988.

While he worked under the Nationwide logo, Mr. Charts achieved the highest awards and was consistently one of the most decorated, honored and successful producers in the entire Nationwide system.

On November 30, 1992, Alex and Helena Charts filed for protection under Chapter 7 of the U.S. Bankruptcy Code. ACAI was still party to a Corporate Agency Agreement with Nationwide. ACAI was a Connecticut stock corporation and Mr. Charts owned all of the stock of ACAI. Mr. Charts' ownership of the ACAI stock was disclosed on the Chapter 7 petitions Mr. and Mrs. Charts filed.

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[1] Alex Charts died in December 2007 and by Order of the Second Circuit Court of Appeals, the administrators of his estate were substituted as parties pursuant to Fed. R. App. Pro. 43(a)(1).

On January 20, 1993 Mr. Charts formed a new corporation, Charts Insurance Associates, Inc. ("CIAI"). Mr. Charts was the President and sole stock-holder of the corporation. On May 10, 1993 a Corporate Agency Agreement was executed between Nationwide and CIAI. Nationwide, with full knowledge of the Bankruptcy, allowed Charts to continue through CIAI selling and servicing Nationwide policies as he did formerly through ACAI. CIAI complied, in all respects, with the Nationwide policies and practices.

At no point did the trustee or any creditor ever assert any interest in the assets of either ACAI or CIAI. Nationwide was never a creditor of Charts' Chapter 7 Estate. At all times, the personal services of Mr. Charts were the critical component of the success or failure of the corporations. On February 13, 1996 the Order of Discharge issued in the bankruptcy proceeding followed on March 1, 1996 by the Final Decree discharging the bankruptcy trustee.

On April 10, 1996, more than seventeen years after Mr. Charts first became an independent Nationwide Agent, and more than three years after Mr. and Mrs. Charts filed their Chapter 7 bankruptcy, Nationwide terminated CIAI. The termination letter provides no reason for the action and at no time was any reason provided.[2] Because of the termination, Mr. Charts was not able to reconstitute his agency or return to the insurance business with the same success he enjoyed while he was a Nationwide franchisee.

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[2] On January 11, 1996, Charts received a letter from Nationwide notifying him that his agreements would terminate April 10, 1996. Mr. Charts requested that Nationwide review the termination of the Agreements. Granting Mr. Charts' request, a Nationwide Administrative Agent Review Board reviewed and on February 12, 1996, endorsed Nationwide's termination of the Agreements. The Agreements terminated on April 10, 1996.

So, on August 11, 1997 Charts Insurance Associates, Inc. ("CIAI") and Alex Charts (collectively "Charts"), brought a three-count action against Nationwide alleging violations of the Connecticut Franchise Act ("the Franchise Act"), Conn. Gen. Stat. § 42-133e *et seq.*, the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et seq.*, and the implied covenant of good faith and fair dealing, in the United States District Court for the District of Connecticut.

Before the case reached trial Nationwide filed a Motion for Summary judgment that ultimately resulted in the Second Circuit's unreported decision, Charts I. A Magistrate Judge issued a recommended ruling granting Nationwide's motion for summary judgment on the ground that Charts' claims against Nationwide were part of the bankruptcy estate of Alex and Helena Charts, and as such could not be asserted by Alex Charts and CIAI. On September 29, 2000, the District Court approved the recommended ruling on that ground, over Charts' objection, and judgment entered for Nationwide. While the Magistrate Judge also recommended dismissal on the basis of judicial estoppel, the District Court did not adopt that ground. *See Charts III* at 362, Pet. App. 13.

Charts appealed and the Second Circuit, without addressing the merits of the District Court's ruling, remanded to the District Court, concluding that the bankruptcy trustee was a necessary party in making a determination as to standing. On remand, the District Court vacated its prior ruling and the action was consolidated with the bankruptcy action. Nationwide then filed a new motion for summary judgment, essentially relying on the same arguments presented in its first motion. On September 30, 2003, after reconsidering the parties' arguments, and hearing from the trustee of Charts' bankruptcy, the District Court denied Nationwide's motion for summary judgment, finding that

the claims were not property of the bankruptcy estate and Charts and CIAI had standing to assert them in this case. *See Charts III*, 397 F. Supp. 2d at 362, Pet. App. 14.

Charts I required the District Judge to reopen a long dormant Chapter 7 bankruptcy proceeding, designate a trustee, and conduct inquiry into whether the claims asserted by the Plaintiffs, Alex Charts and CIAI were property of the Chapter 7 Estate of Mr. and Mrs. Charts. It did so despite the fact that the claims in this case arise from a contract executed by Nationwide and CIAI after the Chapter 7 bankruptcy proceeding was initiated, and involve a party that did not exist before the bankruptcy was filed. The unchallenged findings of fact by the District Court are that the claims are not connected to the pre-bankruptcy activity sufficient to constitute them property of the estate. *Charts II*, 300 B.R. at 558, Pet. App. 72.

Not a single creditor or the Trustee wants anything to do with these claims. After this case was remanded to the District Court, and the District Court reopened the Bankruptcy Estate, a trustee was appointed and each creditor of the Charts Chapter 7 estate was given notice that the estate might have an interest in this case. Not a single creditor asserted in any forum that the claims made by Charts against Nationwide in this action are property of the estate. The Trustee appointed by the District Court, Richard Belford, stated unequivocally that the claims in this action are not property of the Chapter 7 estate. He also said that if the District Court decided the claims were property of the estate, he would abandon the claims to the debtors. But the bankruptcy estate remains open and a party to the action.

On December 20, 2002, Mr. Belford appeared before the District Court and unequivocally restated and rejected Nationwide's position and admitted as a party in the case that the estate did not own the claims in the litigation. Mr. Belford told the Court:

> It's been my position all along, as your Honor knows, that – first, I've never taken any position on the merits of the complaint in the litigation case. It's my position that regardless of the merits, whether it's worth a million dollars or worth zero, in any event, it's not property of the bankruptcy estate in my opinion. And in view of that, I don't think that the –it's of any value to the bankruptcy estate, and that's the reason I filed my notice of intention – notice of proposed abandonment and opportunity for objections.

The Trustee agreed with Charts that the claims in this case were not property of the estate. The District Court denied Nationwide's Motion for Summary Judgment and the case was tried to a jury. *Charts II*.

Trial commenced in the District Court on November 29, 2004. Charts alleged that Nationwide's termination violated the Connecticut Franchise Act because a franchise may not be terminated except for good cause shown and upon written notice with the cause of termination stated therein. Nationwide stipulated that Charts was trained by Nationwide, ran an independent business under the Nationwide Trademark, pursuant to a marketing plan prescribed in substantial part by Nationwide, subject to Nationwide's control in all material respects and was engaged in the business of offering to sell, selling, servicing and distributing Nationwide insurance products in Connecticut. The uncontroverted evidence at trial was that Charts was engaged in the business of offering to sell, selling, distributing and servicing Nationwide Insurance products under a marketing plan prescribed in substantial part by Nationwide, subject to Nationwide's control, and in all events, under, and in association with, Nationwide's trade and service marks. Nationwide's admissions and the consistent evidence at trial gave the jury sufficient evidentiary support for its finding that Nationwide

granted Charts and CIAI a franchise under the Connecticut Franchise Act. *Charts III* at 367-368, Pet. App. 23-24.

Nationwide argued that even if Charts was a franchise it had good cause to terminate and told the jury during its opening statement that it "investigated the allegations that the Charts had engaged in [rebating]" and "conclud[ed] that he had violated *company policy and practice.*" But, at no time during the trial did Nationwide introduce evidence that the reasons underlying the termination of the franchise were violations of state law. *Charts III* at 369, Pet. App. 26. The jury had enough evidentiary support to find that there was not "good cause" for termination. For example, the termination letter sent by Nationwide to Charts, which was entered into evidence, fails to mention the "rebating" incidents as a ground for the termination. In addition, other Nationwide employees testified that they had engaged in similar actions when selling Nationwide policies. *Charts III* at 369-370, Pet. App. 27-28. Nationwide violated the Franchise Act when it terminated Charts and the wrongful termination damaged Charts and gave rise to the Franchise Act claim.

Charts also alleged that Nationwide violated the Connecticut Unfair Trade Practices Act ("CUTPA") and that Charts suffered an ascertainable loss when Nationwide terminated the Agents Agreements. CUTPA applied to the parties' relationship and there was sufficient evidence from which the jury could have found that the acts complained of occurred in the conduct of trade or commerce. *Charts III* at 371, Pet. App. 30.

The jury was instructed that in order for it to find that Nationwide engaged in unfair or deceptive trade practices, it may find that "[t]he practices proved by Charts, without necessarily having been previously considered unlawful, *offend public policy as it has been established by statutes,* the common law, or otherwise-in other words, it is within

at least the penumbra of some common law, *statutory,* or other established concept of unfairness."(emphasis added). *Charts III* at 371, Pet. App. 31. Thus, a finding that Nationwide violated the Franchise Act, and the public policy expressed therein, could support a finding that Nationwide also violated CUTPA. *Id.*, Pet. App. 31-32.

In its portion of the jury charge concerning CUTPA the Court specifically instructed the jury that it could not consider "any actions taken by Nationwide or its employees prior to August 11, 1994 [three years before the suit was brought] on Charts' CUTPA claim." *Charts III* at 372 n. 13, Pet. App. 32. Charts' CUTPA claim accrued, like its Franchise Act claim, upon termination of the franchise, more than three years after Alex and Helena Charts filed for Chapter 7 protection.

At the conclusion of Charts' case-in-chief, Nationwide made an oral motion for judgment as a matter of law pursuant to Rule 50. The Court denied that motion without prejudice to Nationwide renewing it at the conclusion of all the evidence. Nationwide made a second motion for judgment as a matter of law at the conclusion of all the evidence. The Court reserved judgment until after the jury reached its verdict. *Charts III*, 397 F.Supp.2d at 362, Pet. App. 14.

On December 10, 2004, the jury returned its verdict in favor of Charts on all three counts. The Court entered judgment in accordance with the jury's verdict. On December 23, 2004, Nationwide renewed its request for judgment as a matter of law or a new trial. Both parties subsequently submitted numerous memoranda of law in response to Nationwide's motion. *Charts III* at 362-363, Pet. App. 14.

Nationwide made one argument directed at all three counts, renewing the argument that it presented in its summary judgment papers. Nationwide's post-verdict Rule 50 motion argued that it was entitled to judgment as a

matter of law on all three counts on the ground that Charts lacked standing because the claims were part of the bankruptcy estate. The Court found that it need not revisit that decision because Nationwide failed to make the argument in its original pre-verdict Rule 50 motion for judgment as a matter of law. *Charts III*, 397 F. Supp. 2d at 364, Pet. App. 18. Even though Nationwide failed to argue that the Court should address its position to prevent a manifest injustice, the District Court concluded that such a result would not occur, "as the evidence at trial did not alter the Court's prior conclusion on the standing issue." *Charts III* at n. 5, Pet. App. 17. The District Court granted Nationwide's Motion for JMOL as to the implied covenant of good faith and fair dealing. *Charts III* at 373-374, Pet. App. 35-36.

Nationwide Appealed and Charts Cross-Appealed and the case returned to the Second Circuit where the Court heard oral argument on October 23, 2006 and requested the parties submit letter briefs on issues Nationwide's counsel raised during the course of the argument. The parties submitted letter briefs to the Court in which Nationwide raised new arguments, one specifically upon which the case came to rest, in a footnote.

Only then did Nationwide introduce the concept that CIAI was "simply a renamed successor to Charts Old Agency," *Charts IV* at 11; and as such should have been disclosed on the Chapter 7 petitions. The argument was never raised in a motion for summary judgment. That CIAI was a sham was suggested for the first time in footnote 1 of the Letter Brief dated October 26, 2006 filed by Nationwide. That is a critical problem. It was impossible for Charts at that point to develop the factual record to defend against the claim.

The issue raised by Nationwide in its renewed motion for JMOL which should have limited what that Court considered was whether Mr. Charts and/or CIAI had

standing to assert claims that arise from a franchise relationship that Nationwide wrongfully terminated. Nationwide argued that CIAI was not disclosed to the trustee or creditors in the petitions and, therefore, was an asset of the estate because it was "formed" before the filing of the Chapter 7 petition. *Charts II* at 556-7, Pet. App. 69. That was the same argument that resulted, in 2001, in *Charts I,* in which the Second Circuit directed the District Judge to reopen the estate, have a trustee appointed and appear and then, with all parties in the case, figure out who owned the claims asserted here. That was done. The claims belonged to Charts and CIAI – not the estate.

And, again, at no time did Nationwide argue that ACAI and CIAI were the same. The Second Circuit ignored incontrovertible bankruptcy law and Connecticut state law regarding the debtors' interests which compel the legal conclusion that CIAI did not exist pre-petition, and that both Charts as an individual and CIAI had a post-petition franchise relationship with Nationwide which the jury properly found was wrongfully terminated.

Footnote 2 at page 362 of *Charts IV,* in which the Court of Appeals said that Charts never argued that CIAI was entitled to claim the exemption listed in the Chapter 7 petitions for ACAI, Pet. App. 9, ignores the fact that there was no reason to make the argument before. Nationwide's argument was that CIAI "existed" before Charts filed for protection under Chapter 7. *Charts II* at 554, Pet. App. 65. It did not.

When Nationwide suggested that both corporations should be treated as one in the Letter Brief, p. 2, n. 1, it was too little too late.

The trustee and the creditors had notice of the claims in this case. Not one creditor came forward and the trustee said the estate has no interest in the case.

SUMMARY OF ARGUMENT

The decision below impermissibly ignores the definition of property of the estate set forth in 11 U.S.C. § 541(a)(1), in concluding that causes of action for violations of the Connecticut Franchise Act and CUTPA are part of the Chapter 7 debtor's bankruptcy estate, even though it is undisputed that the causes of action accrued post-petition and that all the events comprising the elements of the two causes of action occurred post-petition. At the time Mr. Charts filed his Chapter 7 petition the causes of action did not exist, nor were they anticipated, likely, or even potential causes of action. In finding that these causes of action were part of the bankruptcy estate the court below impermissibly expands this Court's decision in *Segal v. Rochelle*, 382 U.S. 375 (1966), as well as impermissibly extends the reach of 11 U.S.C. § 541(a)(1).

The decision below creates a precedent that results in any causes of action which accrue to a Chapter 7 debtor post-petition, when the Chapter 7 debtor continues in the same line of business being pulled back into the debtor's estate. Such a rule conflicts with the clear text of the Bankruptcy Code, the intent of the Bankruptcy Code to provide a "fresh start" to the debtor, and the holdings of other Circuits and District Courts which have correctly analyzed the definition of property. Under the reasoning of the decision below, a debtor who continues in the same line of business can never obtain the fresh start that is one of the objectives of the Bankruptcy Code.

The decision below impermissibly and incorrectly extends the analysis and language of this Court in *Segal v. Rochelle*, 382 U.S. 375 (1966), relating to post-petition property becoming property of the estate only if "sufficiently rooted in the pre-bankruptcy past," *Segal* at 380, to encompass causes of action accruing post-petition.

The correct interpretation and application of 11 U.S.C. § 541(a)(1) in the context of post-petition causes of action is

an issue of particular public importance in the present economic climate. The decision below conflicts with the decisions of this Court in *Segal v. Rochelle* and *Lines v. Frederick,* 400 U.S. 18 (1970) on the important issue of the reach of 11 U.S.C. § 541(a)(1). The decision below conflicts with decisions of the Third, Fifth, and Eleventh Circuit Courts of Appeal.

The Second Circuit's decision also conflicts with decisions of the Fifth and Ninth Circuit Courts of Appeal with respect to whether an award of damages comprised solely of projected post-petition earnings based on the personal services of the debtor are assets of the bankruptcy estate. The decision below fails to consider, analyze or even address the nature of the asset – i.e., damages consisting of projected post-petition personal services earnings – and by so failing creates a precedent that conflicts with the decisions in other Circuits and eviscerates the personal services exemption found in 11 U.S.C. § 541(a)(6), which exempts from the estate earnings from services performed by an individual debtor after the commencement of the case. An award of damages which consists solely of a projected amount of earnings based on the post-petition personal services of the Chapter 7 debtor Alex Charts falls within the exemption contained in 11 U.S.C. § 541(a)(6). This important question with respect to the scope of the exemption contained in 11 U.S.C. § 541(a)(6) needs to be clarified and the conflict between the Circuits needs to be resolved.

In order to reach the result in the decision below, the Second Circuit disregarded clearly controlling State law, and decisions of this Court with respect to the applicability of State law, when it concluded that a Connecticut Corporation was formed prior to a Certificate of Incorporation being filed with the Connecticut Secretary of State. In so concluding, the Second Circuit impermissibly preempted State law regarding corporate formation in

Connecticut. The decision below disregards decisions of this Court, *see Butner v. United States*, 440 U.S. 48 (1979), holding that interests in property are determined by reference to state law.

The effect of the decision below is to blur the statutorily mandated bright line for corporation formation in Connecticut. Both in the context of bankruptcy proceedings and for the full range of commercial and corporate transactions, this blurring of the statutory formation date for any Connecticut corporation has far reaching consequences relating to corporate formation and the controlling authority of State law in this area.

Finally, the decision below articulates a standard with respect to what constitutes abandonment of property in the context of a Chapter 7 bankruptcy proceeding that is in conflict with 11 U.S.C. § 554(a). The Second Circuit set forth a standard for abandonment stating that the "trustee's intent to abandon an asset must be clear and unequivocal." *Charts IV* at 123, Pet. App. 10. The Second Circuit did not analyze the issue of abandonment of the asset – in this case the causes of action against Nationwide – with reference to the requirements of 11 U.S.C. § 554(a), which sets forth the formal requirements for what constitutes abandonment under the Bankruptcy Code. The decision below disregards and is in conflict with the requirements of the Bankruptcy Code.

The result of the decision below is to take a valuable asset, i.e. a damage award of $2.3 million the merits of which have not been overturned, and deprive both the debtor and the creditors of the benefit of the award, a result so clearly in conflict with the purpose and intent of the Bankruptcy Code that it must not stand.

ARGUMENT

1. Charts' causes of action asserting violations of the Connecticut Franchise Act and the

Connecticut Unfair Trade Practices Act are property of Charts and not property of the bankruptcy estate

A. The decision below conflicts with the decisions of the Third, Fifth and Eleventh Circuit Courts of Appeals.

In concluding that the Connecticut Franchise Act and CUTPA claims of Charts belonged to the bankruptcy estate, the decision of the Court below conflicts with decisions of the Third, Fifth, and Eleventh Circuit courts of appeals, and numerous district courts which have analyzed the issue of whether State law claims belong to the estate. These courts have correctly held that claims accruing after the filing of the bankruptcy petition are not property of the estate.

B. Charts' claims accrued after the filing of the bankruptcy petition.

The District Court decision from which Nationwide appealed to the Second Circuit denied Nationwide's motion for judgment as a matter of law or motion for a new trial with respect to Charts' causes of action for breach of the Connecticut Franchise Act and breach of CUTPA. The asset at issue is the damage award for Nationwide's breach of these two statutes.

The Connecticut Franchise Act claim for which damages were awarded did not accrue until there was a breach of the Connecticut Franchise Act by Nationwide. In this case there was a very clear event that constituted the breach – the termination of Charts' ability to sell and service Nationwide insurance policies. It is undisputed that the termination occurred in April, 1996, more than three years after Mr. and Mrs. Charts filed for bankruptcy protection. At the time the Charts' filed the petition,

simply no cause of action for breach of the Connecticut Franchise Act existed, was anticipated, or could have been anticipated.

The same set of facts also gave rise to a cause of action based on violations of CUTPA, and again, the violation of CUTPA – the termination of Mr. Charts' ability to sell and service Nationwide insurance policies – did not occur until more than three years post-petition. A CUTPA cause of action also requires an "ascertainable loss" as an element of the claim. Conn. Gen. Stat. § 42-110g(a). Mr. Charts did not suffer the "ascertainable loss" until he could no longer sell and service Nationwide insurance policies, which did not occur until over three years post-petition. Therefore, the causes of action for which damages were awarded did not accrue until over three years post-petition and could not have been brought at the time of the commencement of the estate.

This Court has held that the determination of property rights in the assets of a bankrupt's estate is left to State law, *Butner v. United States*, 440 U.S. 48, 54 (1979). Under Connecticut law, a cause of action does not accrue until a plaintiff has suffered actionable harm. *Champagne v. Raybestos-Manhattan, Inc.*, 562 A.2d 1100, 212 Conn. 509, 521 (1989). The violation of the Connecticut Franchise Act did not occur until April, 1996, when Alex Charts' ability to sell and service Nationwide insurance policies was terminated without good cause. This event also constituted the violation of CUTPA. CUTPA further requires an ascertainable loss as an element of a claim for a CUTPA violation. Conn. Gen. Stat. § 42-110g(a). This ascertainable loss did not arise until the termination occurred. The termination did not have its genesis pre-petition.

The Circuit courts that have analyzed whether claims are property of the estate under 11 U.S.C. § 541(a)(1) have uniformly analyzed the issue from the standpoint of

determining when the claim accrued; if it accrued pre-petition it is property of the estate, if post-petition it is property of the debtor. *In re Seven Seas Petroleum, Inc.*, 522 F.3d 575 (5th Cir. 2008); *In re Witko*, 374 F.3d 1040 (11th Cir. 2004); *In re Segerstrom*, 247 F.3d 218 (5th Cir. 2001); *Bobroff v. Continental Bank*, 766 F.2d 797 (3d Cir. 1985).

In *Witko*, the Eleventh Circuit, undertaking the analysis required by 11 U.S.C. § 541(a)(1) and also followed by the 3rd and 5th Circuits in the cases cited above, analyzed whether the debtor's legal malpractice claim against his divorce attorney was property of the debtor *Witko's* bankruptcy estate. The bankruptcy court had held that *Witko's* cause of action was property of the estate because pre-petition acts formed part of a chain of events that had lead to a post-petition "redressable harm;" therefore, the cause of action was "sufficiently rooted in the debtor's pre-petition past...." *Witko* at 1044.

The Eleventh Circuit, following this Court's decision in *Butner v. United States*, 440 U.S. 48, 55 (1979), held that "property" and "interests in property" are creatures of State law. *Witko* at 1043. Then applying the appropriate State law, the Court determined that even though some of the acts constituting one element of the cause of action occurred pre-petition, the cause of action does not occur until the last element constituting the cause of action occurs. *Witko* at 1043-44, (*citing Blumberg v. USAA Cas. Ins. Co.*, 790 So.2d 1061, 1065 (Fla. 2001)). In *Witko* the last element occurred post-petition. Therefore, Mr. Witko's legal malpractice cause of action did not exist at the time he filed his bankruptcy petition and was not part of his bankruptcy estate.

Many district courts also have followed the same analysis as the *Witko* case in determining ownership of a cause of action. *See, e.g., Raines v. Strittmatter*, 2005 WL 1115804 (S.D. Ind.) (claims accruing post-petition but prior

to discharge in bankruptcy are property of debtor, not estate), *Holstein v. Knopfler*, 321 B.R. 229 (2005) (property of the estate is determined as of the commencement of the bankruptcy case; claims which do not occur until post-petition are not part of the bankruptcy estate); *Calabrese v. McHugh*, 170 F. Supp. 2d 243 (D. Conn. 2001) (To be sufficiently rooted in the debtor's pre-bankruptcy past, all of the elements of the cause of action must have occurred at the time the bankruptcy case was commenced.).

C. The Court below impermissibly expanded this Court's decision in *Segal v. Rochelle*, and its decision is in conflict with the decisions of the Third, Fifth, and Eleventh Circuits.

The Second Circuit ostensibly relied on this Court's decision in *Segal v. Rochelle* in order to find that the post-petition causes of action of Charts were "sufficiently rooted in the pre-bankruptcy past." *Charts IV* at 122, Pet. App. 9. Yet the Court undertook no analysis with respect to whether the claims occurred pre- or post-petition. The Court ignored the fact that the asset at issue in the *Segal* case – loss-carryback refunds – existed pre-petition but was realized post-petition.

In *Lines v. Frederick*, 400 U.S. 18 (1970), this Court stated that the "most important consideration limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankrupty Code to give the debtor a 'new opportunity in life and a clear field for future effort'...." *Lines v. Frederick*, 400 U.S. at 19 (citations omitted). In *Lines*, as in *Segal*, this Court looked at whether the asset itself existed pre-petition, even if realized post-petition. If the asset did not exist pre-petition, it was not part of the estate.

The Second Circuit's decision muddies clear law in this Court and the Third, Fifth, and Eleventh Circuits

concerning whether causes of action occurring post-petition are property of the estate. This Court should grant the present petition to clarify this important issue.

II. The Second Circuit failed to analyze the nature of the asset, which consisted solely of monetary damages based on the projected post-petition earnings for personal services of Alex Charts when it found the asset was property of the estate in derogation of 11 U.S.C. § 541(a)(1) and § 541(a)(6).

A. The decision below creates the anomalous result of making projected earnings from post-petition personal services property of the bankruptcy estate when those services should be exempt under the plain language of 11 U.S.C. § 541(a)(6).

The plain language of the Bankruptcy Code provides that "earnings from services performed by an individual debtor after the commencement of the case" are exempt from the definition of "property" of the estate. 11 U.S.C. § 541(a)(6). This personal services exemption requires that the Court analyze the nature of the asset at issue to determine if it falls within the exemption. This the court below utterly failed to do.

If the Second Circuit analyzed or even discussed the nature of the asset, it would have reached the conclusion that the asset fell under the personal services exemption contained in the Code. It is undisputed that the asset at issue consists of $2.3 million of earnings, based on projected post-petition earnings of Mr. Charts. It also is undisputed that these projected earnings were all post-petition, as they were based on the period commencing after April, 1996. By not analyzing the asset, the Second

Circuit completely disregarded the plain language of 11 U.S.C. § 541(a)(6) and impermissibly dragged the post-petition earnings of Mr. Charts into the estate.

B. The decision below conflicts with decisions of the Fifth and Ninth Circuit Courts of Appeals which have considered the same issue.

The Fifth Circuit has on a number of occasions considered the issue of whether earnings for personal services, as well as contracts for personal services are property of the estate or are exempt. In *Ford, Bacon & Davis, Inc. v. Holahan*, 311 F.2d 901 (5th Cir. 1962), *cert. den.* 373 U.S. 913 (1963), a case decided under the Bankruptcy Act, the court examined the issue of whether post-petition payments under a personal services contract belonged to the estate. The personal services contract at issue was a contract entered into by a corporate debtor.

The Fifth Circuit held that a corporation could enter into a personal services contract. The inquiry was into the nature of the contract itself, and the exercise of some personal skill and judgment on the part of the debtor. *Ford* at 904. In the *Ford* case the court found there was a personal services contract entered into by a corporation pursuant to which personal services were provided and payment made post-petition. Therefore, the payment for services was not part of the bankrupt estate.

The Fifth Circuit has used the same analysis with respect to the personal services exemption under the Bankruptcy Code. In the case of *Matter of Clark*, 891 F.2d 111 (5th Cir. 1989), the court held that earnings for personal services received post-petition by the debtor Bruce Clark, a professional football player, under a contract entered into pre-petition, were exempt from the estate, pursuant to 11 U.S.C. § 541(a)(6). The court

summarizes its analysis as "[t]he controlling question is when the earning took place...." *Clark* at 113.

The Second Circuit's decision at issue here directly conflicts with the decisions of the Fifth Circuit. The Second Circuit in *Charts IV* in fact held that post-petition earnings for Mr. Charts' personal services (which came in the form of an award of damages) were part of the estate because they were sufficiently rooted in the pre-bankruptcy past by virtue of a post-petition contract between Charts Insurance Agency, Inc. and Nationwide, which stated it had a retroactive effective date of January 1, 1980, the approximate date Mr. Charts began selling and servicing Nationwide policies. *Charts IV* at 123, Pet. App. 9. This analysis directly conflicts with the *Ford* and *Clark* cases.

The Ninth Circuit analyzed 11 U.S.C. § 541(a)(6) in the context of whether post-petition renewal commissions paid to the debtor insurance agent for policies sold pre-petition are included within the scope of the post-petition earnings exception. The court in *In re Wu*, 173 B.R. 411 (9th Cir. 1994), analyzed whether any post-petition services were involved in order to obtain the commissions. If so, and to the extent of the post-petition services, the commissions were not property of the estate. *Id.* at 414-415. The fact that the debtor continued in the same line of business pre- and post-petition, or that the debtor continued as a State Mutual Life Assurance Company of America career agent post-petition under her pre-petition career agent agreement was irrelevant to the Ninth Circuit's analysis of 11 U.S.C. § 541(a)(6), in complete contrast with the Second Circuit's analysis in *Charts IV*.

As the decision below conflicts with 11 U.S.C. § 541(a)(6) and with decisions of the Fifth and Ninth Circuits and district court decisions as to the scope and application of 11 U.S.C. § 541(a)(6) in the context of earnings related to post-petition personal services when

the debtor continues in the same line of business or under the same contractual arrangement post-petition, this Court must clarify the correct interpretation and application of 11 U.S.C. § 541(a)(6).

III. The decision below impermissibly preempted state law which defines when a corporation comes into existence and conflicts with this Court's holding in *Butner v. United States*, 440 U.S. 48 (1979).

Corporate formation issues are governed by state law. *See, Butner v. United States,* 400 U.S. 48 (1979). Conn. Gen. Stat. § 33-637(a) unequivocally provides that a corporation's existence begins when the certificate of incorporation is filed with the Secretary of State. *Mastroianni v. Fairfield County Paving, LLC*, 942 A.2d 418, 424 (Conn. App. 2008). One of the primary goals of the Connecticut Business Corporation Act, codified at §§ 33-600 to 33-998 was to bring to the statutes the uniformity and predictability that comes from an act based on the Revised Model Business Corporations Act and which has been adopted by the majority of states. *See*, Marilyn J. Ward Ford, *Connecticut Corporation Law and Practice*, 1-1 to 1-2 (2d. ed. Supp. 2008).

The decision below ignores both the Connecticut statutes as well as incontrovertible bankruptcy law which requires reliance on state law. *See Butner v. United States*, 440 U.S. 48 (1979). The Second Circuit disregarded that the CIAI certificate of organization was filed with the Connecticut Secretary of State in January, 1993, a date post-petition. The Second Circuit did so in order to hold that CIAI existed pre-petition and should have been listed on Mr. Charts' bankruptcy schedules. *Charts IV* at 123, Pet. App. 10. The refusal of the Second Circuit to apply said statutes is a significant departure from settled law and has a profound effect on bankruptcy law. By

muddying the bright line as to when a corporation is formed the decision below puts debtors in the untenable position of not knowing what to list on their schedules and having to proceed at their peril.

IV. In analyzing the issue of abandonment, the court below failed to follow the plain language of 11 U.S.C. § 554(a).

Prior to 1978, the Bankruptcy Code did not contain any provision specifying the method of abandonment of assets by the trustee in a bankruptcy estate. The historical source of the doctrine dates to the early English Bankruptcy Acts, but the American courts consistently recognized it and applied it despite the lack of express authorization in the Bankruptcy Act. *See Note: Abandonment of Assets by a Trustee in Bankruptcy*, 53 Colum.L.Rev. 415, 416 (1953)

With the enactment of § 554 of the Bankruptcy Code in 1978 there were formal requirements for abandonment. In *Charts IV*, however, the Second Circuit, while holding that the claims at issue were not abandoned, does not make mention of the requirements of § 554(a), let alone conduct any analysis with respect to the requirements of the Code. The court preempts the Code requirements of notice and hearing, *see* 11 U.S.C. § 554(a), and substitutes its own standard of "clear and unequivocal intent" to abandon. *Charts IV* at 123, Pet. App. 10. If the court had analyzed the statutory requirements, the court would have had to find that there was in fact notice. *See* Notice of Proposed Abandonment of Property and Opportunity for Objection Thereto, Sept. 18, 2002, Pet. App. 105. The court also references testimony of the trustee in a hearing before the district court acting as bankruptcy court, but again fails to analyze or consider whether the notice and hearing requirements of the statute were met. *Charts IV* at 123, Pet. App. 11.

This Court has explained repeatedly that, in construing and applying the Bankruptcy code, the court must look to the statutory text. *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). The court must apply the provisions of the Code as written, and refrain from engrafting provisions that do not appear on its face. *Id.* at 537. In failing to analyze abandonment in accordance with the requirements of the Code, the Second Circuit erred. Further, the court substituted its own standard for analyzing abandonment, in derogation of the Code requirements.

V. The decision below contravenes the primary purpose of the Bankruptcy Code. In finding that the asset belonged to the estate, which remains a party to the action, the court should have remanded the case.

The Court of Appeals should have remanded and directed the District Court to amend the judgment consistent with its decision. In its decision the Court of Appeals found both that the claims asserted are property of the bankruptcy estate and that the trustee did not abandon the claims. *See Charts IV* at 123-124, Pet. App. 9-11. The jury determined that the value of the claims, the right to payment, is $2.3 million. Under the Court of Appeals' analysis the judgment is property of the bankruptcy estate. On July 17, 2002 the re-opened bankruptcy case was closed and the file transferred to the District Court, withdrawing the reference of the bankruptcy case. Subsequently, in the District Court proceedings the bankruptcy estate was joined as a plaintiff. The bankruptcy estate remains a party to the action. *See Charts II* at 558, n. 7, Pet. App. 72. "The main thrust of s 70a(5) [now 11 U.S.C. § 541] is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition."

Segal v. Rochelle, 382 U.S. 375, 379 (1966). Consistent with the purpose of the Bankruptcy Code, distribution to creditors, and its own findings, the Court of Appeals should have remanded the case with direction that the District Court Amend the Judgment in favor of the bankruptcy estate and not CIAI. No bankruptcy distributional purpose is served by simply reversing, rather if the Circuit Court's determinations must stand, the judgment should be amended in favor of the bankruptcy estate.

CONCLUSION

For all the foregoing reasons, this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully Submitted,

The PETITIONERS

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Supreme Court, U.S.
FILED

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No. 09-____

08-933 JAN 13 2009

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER CHARTSCHLAA and ANGELA SAWICKI KING, as personal representatives of ALEX CHARTS, deceased, doing business as Alex Charts Agency, Inc. and Charts Insurance Associates, Inc.

Petitioners

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, NATIONWIDE LIFE INSURANCE COMPANY, NATIONWIDE PROPERTY AND CASUALTY COMPANY, NATIONWIDE VARIABLE LIFE INSURANCE COMPANY AND COLONIAL INSURANCE COMPANY OF CALIFORNIA

Respondents

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Second Circuit

APPENDIX

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Jan. 13, 2009

Chartschlaa v. Nationwide Mut. Ins. Co., 538 F.3d 116 (2d Cir. 2008) ("Charts VI")

United States Court of Appeals,
Second Circuit.

Peter CHARTSCHLAA and Angela Sawicki King as personal representatives of Alex Charts, deceased, doing business as Alex Charts Agency Inc. and Charts Insurance Associates, Inc.,[1] Plaintiffs-Appellees-Cross-Appellants,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Co., Nationwide Property and Casualty Company, Nationwide Variable Life Insurance Company and Colonial Insurance Company of California, Defendants-Appellants-Cross-Appellees,

Helena Charts and Christopher L. Garcia, Plaintiffs.

Docket Nos. 05-5988-cv(L), 05-6603-cv(xap).
Argued: Oct. 23, 2006.
Decided: Aug. 14, 2008.

Before: WINTER, McLAUGHLIN, and STRAUB, Circuit Judges.

PER CURIAM:
Defendants-Appellants-Cross-Appellees Nationwide

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[1] Alex Charts died during the pendency of these proceedings, and by order of this Court filed June 26, 2008, Peter Chartschlaa and Angela Sawicki King were substituted as parties pursuant to Federal Rule of Appellate Procedure 43(a)(1).

Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide Property and Casualty Company, Nationwide Variable Life Insurance Company, and Colonial Insurance Company of California (collectively, "Nationwide"), appeal from a judgment entered by the United States District Court for the District of Connecticut (Droney, *J.*) upon a jury verdict in favor of Plaintiffs-Appellees-Cross-Appellants Alex Charts and Charts Insurance Associates, Inc. ("CIAI"). Charts and CIAI cross-appeal the district court's denial of their motion for prejudgment interest and grant of Nationwide's motion for judgment as a matter of law on one of their claims.

Charts and CIAI, former sellers of Nationwide insurance policies, sued on several claims arising out of Nationwide's termination of their relationship. For the reasons that follow, we hold that those claims belong to the bankruptcy estate of Alex Charts and not to either of the plaintiffs. Accordingly, we reverse the judgment of the district court and direct that judgment be entered in favor of Nationwide.

BACKGROUND

We assume familiarity with the district court's and our prior decisions in this case. *See Charts v. Nationwide Mut. Ins. Co.*, 16 Fed.Appx. 44 (2d Cir.2001) (" *Charts I* ";) *Charts v. Nationwide Mut. Ins. Co.*, 300 B.R. 552 (D.Conn.2003) (" *Charts II* "); *Charts v. Nationwide Mut. Ins. Co.*, 397 F.Supp.2d 357 (D.Conn.2005) (" *Charts III* "). We recount here only those facts necessary for resolution of this appeal.

Since at least 1979, Alex Charts has been in the business of selling Nationwide insurance. He started as an

individual agent with an individual agent's agreement. In 1986, Charts entered into a new agency agreement (the "Corporate Agency Agreement") with Nationwide through a corporation called Alex Charts Agency, *120 Inc. (the "Old Agency"), of which Charts was the sole shareholder. In October 1992, Charts formed CIAI as a new corporate entity for his insurance business. That month, the officers and directors of CIAI, including Charts, held an organizational meeting. Charts prepared the incorporation papers for CIAI, but delayed filing them.

In December 1992, Charts and his wife filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Connecticut. As required in a Chapter 7 bankruptcy proceeding, Charts filed various schedules of assets and liabilities. *See*11 U.S.C. § 521. Charts listed the Old Agency as the name of his insurance business. He did not list his interest in CIAI as an asset of his estate.

In January 1993, Charts formally filed the certificate of organization for CIAI with the Connecticut Secretary of State.

In May 1993, while still in bankruptcy proceedings, Charts executed a new agency agreement with Nationwide on behalf of CIAI (the "CIAI Agreement"). The CIAI Agreement, which had an effective date retroactive to January 1, 1980, allowed CIAI to market and service Nationwide insurance contracts as Charts had done in the past individually and through the Old Agency.

In 1995, Nationwide launched an internal investigation into potential misconduct by its Connecticut agents. During that investigation, several agents alleged that Charts engaged in prohibited business practices.

In January 1996, Nationwide terminated the CIAI Agreement.

In February 1996, Charts obtained an order of discharge in his bankruptcy proceedings, and the bankruptcy court closed the case.

In August 1997, Charts and CIAI sued Nationwide in the United States District Court for the District of Connecticut (Droney, *J.*). The plaintiffs alleged that Nationwide terminated the CIAI Agreement because of Charts's age and in retaliation for Charts's own reporting of misconduct by Nationwide employees to Nationwide management. The plaintiffs contended that these actions violated the covenant of good faith and fair dealing implied in the CIAI Agreement as well as Connecticut statutory law. Nationwide moved for summary judgment on the ground that the CIAI Agreement and any cause of action based on that contract were part of the bankruptcy estate.

In August 2000, a Magistrate Judge (Garfinkel, *M.J.*) recommended that the district court grant Nationwide's motion, finding that Charts's claims belonged to the bankruptcy estate and that his failure to disclose the existence of CIAI in the bankruptcy case was "clearly not inadvertent." In September 2000, the district court adopted this recommendation. Charts appealed that judgment to this Court, and we vacated the judgment, without reaching the merits, on the ground that the estate should have been joined as a party to the suit. *Charts I,* 16 Fed.Appx. at 44.

On remand, the district court reopened the bankruptcy case for the purpose of appointing a trustee to represent the estate's interests in this litigation. Nationwide

thereafter renewed its motion for summary judgment, iterating its position that the claims belonged to the bankruptcy estate. The trustee then entered an appearance and expressed his intent to abandon the claims against Nationwide under 11 U.S.C. § 554(a) by filing a notice of proposed abandonment. Nationwide objected to the proposed abandonment.

*121 At a December 2002 hearing, the trustee informed the district court that he had entered negotiations to sell the claims to Nationwide, and soon planned to file a proposed notice of sale of the claims. On that basis, the trustee requested that the court take no action with respect to the proposed abandonment.

In September 2003, the district court denied Nationwide's renewed motion for summary judgment, reversing its earlier position. This time, the district court held that Charts owned the disputed claims after all, because the claims arose after the bankruptcy filing and such "post-petition" claims generally do not belong to the estate. *Charts II,* 300 B.R. at 556-58. In its ruling, the district court noted its understanding that the trustee had sold, rather than abandoned, whatever interest it held in the claims. Id. at 556 n. 5. Thus, the court observed, "if the Court were to hold that these claims were property of the estate, ... Charts would not have standing to assert them because any claim owned by the estate is now held by Nationwide." Id. In fact, however, the proposed sale of the claims to Nationwide was never finalized.

The case proceeded to a jury trial. At trial, Charts testified that CIAI was simply the new name and corporate identity of the very same insurance business he had previously operated through the Old Agency:

Q: So that business from Alex Charts Agency, Inc., the Nationwide policies for which that company was receiving commissions, that was all rolled over to the new company?

A: Everything stayed the same....

....

Q: When you say everything stayed the same, am I characterizing this fairly by essentially saying-and tell me if I'm wrong-that all of the business that you had been doing as Alex Charts Agency, Inc. for which you were receiving ongoing commissions, that ... was simply moved over to the new company, Charts Insurance Associates, Inc.?

A: Yes.

Q. Did you have employees of Alex Charts Agency, Inc.?

A. Yes.

Q. Did all of those individuals who were employees of Alex Charts Agency, Inc. at the time you wound down that business, that corporation, become employees of Charts Insurance Associates, Inc.?

A. Yes.

The jury returned a verdict for Charts on all counts, awarding $2.3 million in damages.

Nationwide filed a post-verdict motion for judgment as a matter of law. The plaintiffs moved for prejudgment interest and for attorneys' fees. The district court denied Nationwide's motion except as to the plaintiffs' claim for

breach of the implied covenant of good faith and fair dealing; denied the plaintiffs' motion for prejudgment interest; and awarded the plaintiffs $750,000 in attorneys' fees. *Charts III,* 397 F.Supp.2d at 370, 372, 374, 385-86.

On appeal, Nationwide continues to press its argument that the claims belong to Charts's bankruptcy estate, and not to the plaintiffs. We agree. Because ownership of the claims is a threshold issue, we need not reach the numerous other arguments raised in the appeal and cross-appeal.

DISCUSSION

This Court reviews *de novo* a district court's resolution of a motion for *122 judgment as a matter of law under Federal Rule of Civil Procedure 50(b), applying the same standard that the district court was required to apply. *Diesel v. Town of Lewisboro,* 232 F.3d 92, 103 (2d Cir.2000). Thus, we "consider the evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences from the evidence that the jury might have drawn in that party's favor." *Id.* Whether a cause of action belongs to a bankruptcy estate is a question of law, which we review *de novo. See In re Swift,* 129 F.3d 792, 795 (5th Cir.1997).

Our analysis begins with 11 U.S.C. § 541(a)(1), which defines the bankruptcy estate as including "all legal or equitable interests of the debtor in property as of the commencement of the case." "It would be hard to imagine language that would be more encompassing" than this broad definition. 4 *Collier on Bankruptcy* ¶ 541.01 (15th ed.2001). "[E]very conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541." *In re Yonikus,*

996 F.2d 866, 869 (7th Cir.1993). Contractual rights clearly fall within the reach of this section, *see, e.g., Cohen v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.),* 138 B.R. 687, 701 (Bankr.S.D.N.Y.1992), as do causes of action owned by the debtor or arising from property of the estate, *see Seward v. Devine,* 888 F.2d 957, 963 (2d Cir.1989)

Given the wide scope of § 541, the debtor's obligation to disclose *all* his interests at the commencement of a case is equally broad. *See*11 U.S.C. § 521(a)(1)(B)(i), (iii) (requiring debtor to "file ... a schedule of assets and liabilities ... and a statement of the debtor's financial affairs"). Because full disclosure by debtors is essential to the proper functioning of the bankruptcy system, the Bankruptcy Code severely penalizes debtors who fail to disclose assets: While properly scheduled estate property that has not been administered by the trustee normally returns to the debtor when the bankruptcy court closes the case, undisclosed assets automatically remain property of the estate after the case is closed. *See*11 U.S.C. § 554(c), (d); *Collier, supra,* ¶ 554.03. "A debtor may not conceal assets and then, upon termination of the bankruptcy case, utilize the assets for [his] own benefit." *Kunica v. St. Jean Fin., Inc.,* 233 B.R. 46, 53 (S.D.N.Y.1999).

Because assets within the estate are those that exist "as of the commencement of the case,"11 U.S.C. § 541(a), property acquired by the debtor *after* the filing of a bankruptcy petition generally does not become part of the estate. Benjamin Weintraub & Alan N. Resnick, *Bankruptcy Law Manual* § 5:6 (5th ed.2008). However, "[a]fter-acquired" property will vest in the estate if it is derived from property that was part of the estate as of the commencement of the bankruptcy. *See*11 U.S.C. § 541(a)(6) (making "[p]roceeds, product[s], offspring, rents

or profits of or from property of estate" part of bankruptcy estate). Post-petition property will become property of the estate only if it is "sufficiently rooted in the pre-bankruptcy past." *Segal v. Rochelle,* 382 U.S. 375, 380, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966) (interpreting Bankruptcy Act of 1898).

The plaintiffs argue that Charts had no duty to disclose the existence of CIAI because it was not formally incorporated until after the date of the bankruptcy petition, and therefore is not part of the bankruptcy estate. We disagree. Charts readily admitted in deposition testimony that CIAI was formed in October 1992, *123 prior to filing his bankruptcy petition. Charts also conceded that CIAI was incorporated simply to change the name of his preexisting insurance business, and that this change occurred in October 1992, when CIAI was organized. The Bankruptcy Code is premised on full and complete disclosure of the debtor's finances. A debtor who "elects to avail himself of the benefits of the federal bankruptcy laws by the filing of a petition ... can no longer expect to have any financial secrets." *In re Trout,* 108 B.R. 235, 238 (Bankr.D.N.D.1989). The existence of CIAI-the formal incorporation of which Charts delayed until soon after filing for bankruptcy and which was intended as simply a renamed successor to Charts's Old Agency-should have been disclosed to the bankruptcy trustee.[2] And

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[2] When he filed for bankruptcy, Charts listed the Old Agency as an exemption under 11 U.S.C. § 522(d)(5), valuing the business at a mere $1. That provision allows debtors to exempt from the bankruptcy estate up to $11,200 in estate property. 11 U.S.C. § 522(d)(5). The plaintiffs have not argued that CIAI was subject to this exemption or that the CIAI Agreement is not a product of the bankruptcy estate by virtue of the exemption. In a dispute that has entered its second decade, we will not take up this argument for them. *See* Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir.1998) (issues not sufficiently argued considered waived).

because CIAI's existence was not disclosed, it remains part of the bankruptcy estate. *See Kunica,* 233 B.R. at 53.

Further, the CIAI Agreement is also an asset of the bankruptcy estate, even though it was not signed until May 1993. During his deposition, Charts conceded that Nationwide issued a new contract to CIAI at his request because of the change of his business's name. Even more telling, the CIAI Agreement had a retroactive effective date of January 1, 1980-the approximate date that Charts began doing business with Nationwide. The parties thus perceived the CIAI Agreement as merely a continuation of their longstanding business relationship. *See* Weintraub & Resnick, *supra,* § 5:6 n. 1 ("It is important to distinguish between property that is acquired after the case is commenced and property that merely changes in form."). Accordingly, the CIAI Agreement is deeply rooted in the pre-bankruptcy past, and should be considered part of the bankruptcy estate.

Because the claims asserted by the plaintiffs arose from CIAI and the CIAI Agreement, they are also property of the bankruptcy estate, and those claims may not be brought by the plaintiffs.

Finally, we reject the plaintiffs' argument that the rights in Charts's insurance business were abandoned to Charts after the trustee filed and served on creditors a notice of proposed abandonment of the claims. Abandonment is not a process to be taken lightly. Once an asset is abandoned, it is removed from the bankruptcy estate, and this removal is irrevocable except in very limited circumstances. *See* Catalano v. Comm'r, 279 F.3d 682, 686 (9th Cir.2002). In light of the impact of abandonment on the rights of creditors, a trustee's intent to abandon an asset must be clear and unequivocal. *See* In re Sire Plan, Inc., 100 B.R.

690, 693 (Bankr.S.D.N.Y.1989).

Here, the trustee informed the district court that it intended to sell the claims to Nationwide. This representation was inconsistent with the trustee's previously evinced intent to abandon the property to Charts. Indeed, the trustee specifically requested that the court take no action on the abandonment issue while the negotiations were pending. Although the sale was never consummated, there is no indication*124 that the trustee ever renewed its request to abandon the claims. Under these circumstances, the trustee's intent to abandon the claims was ambiguous. Absent an unambiguous intent to abandon estate property, the proposed abandonment is not effective.

CONCLUSION

For the foregoing reasons, the judgment of the district court is REVERSED. We direct the district court to enter judgment for Nationwide.

Charts v. Nationswide Mut. Ins. Co., 397 F. Supp. 2d 357 (D. Conn. 2005) ("Charts III")

United States District Court,
D. Connecticut.
Alex CHARTS and Charts Insurance Associates, Inc.
Plaintiffs,
v.
NATIONWIDE MUTUAL INSURANCE CO., et al.
Defendants
No. Civ.A. 397CV1621CFD.
Oct. 25, 2005.

DRONEY, District Judge.

The plaintiffs, Charts Insurance Associates, Inc. ("CIAI") and Alex Charts (collectively "Charts"), brought this three-count action against Nationwide,[1] alleging violations of the Connecticut Franchise Act ("the Franchise Act"), Conn. Gen.Stat. § 42-133e *et seq.*, the Connecticut Unfair *362 Trade Practices Act ("CUTPA"), Conn. Gen.Stat. § 42-110a *et seq.*, and the implied covenant of good faith and fair dealing. Following a nine-day trial, the jury returned a verdict in favor of Charts on all three counts and awarded damages of $2,300,000. Judgment was entered on December 13, 2004. Pending are three post-trial motions: (1) Nationwide's motion for judgment as a matter of law on all three counts pursuant to Fed.R.Civ.P. 50, or, in the alternative, for a new trial pursuant to Fed.R.Civ.P. 59; (2) Charts' motion for attorney's fees; and (3) Charts' motion for prejudgment interest. For the following reasons,

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[1] The defendants are Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide Variable Life Insurance Company, and Colonial Insurance Company of California. They will be referred to collectively as "Nationwide."

Nationwide's motion is granted in part and denied in part. Charts' motion for prejudgment interest is denied, and Charts' motion for attorney's fees is granted, as modified by the Court.

The procedural background of this case has been recounted in prior rulings. *See Alex Charts and Charts Ins. Assoc., Inc. v. Nationwide Mutual Ins. Co.*, 16 Fed.Appx. 44 (2d Cir.2001); *Charts v. Nationwide Mut. Ins. Co.*, 300 B.R. 552, 553 (2003). In order to frame the discussion of the parties' post-trial motions, however, the Court sets forth the following limited background: Charts brought this action against Nationwide on August 11, 1997, claiming various violations of Connecticut law arising from Nationwide's termination of Charts' insurance agency. After three years of contested motion practice, Magistrate Judge William I. Garfinkel issued a recommended ruling granting Nationwide's motion for summary judgment on the ground that, *inter alia,* Charts' claims against Nationwide were part of the bankruptcy estate of Alex and Helena Charts, and as such could not be asserted here by Alex Charts and CIAI.[2] On September 29, 2000, this Court approved the recommended ruling on that ground, over Charts' objection, and judgment entered for Nationwide.[3] The Second Circuit, without addressing the merits of this Court's ruling, remanded to the District Court, concluding that the bankruptcy trustee was a necessary party in making a determination as to standing. On remand,

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[2] "On December 14, 1992, Alex Charts and his wife Helena filed their voluntary petition under Chapter 7 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Connecticut. On February 13, 1996, the Bankruptcy Court issued an Order of Discharge of Debtor, and the bankruptcy case was closed on March 1, 1996." *Charts v. Nationwide Mut. Ins. Co.*, 300 B.R. 552, 553 (2003).

[3] Judge Garfinkel also recommended that the action be dismissed on the basis of judicial estoppel, but that ground was not adopted by the District Court.

therefore, this Court vacated its prior ruling and the action was consolidated with the bankruptcy action. Nationwide then filed a new motion for summary judgment, essentially relying on the same arguments presented in its first motion. On September 30, 2003, after reconsidering the parties' arguments, and hearing from the trustee of Charts' bankruptcy, the Court denied Nationwide's motion for summary judgment, finding that the claims were not property of the bankruptcy estate and Charts and CIAI had standing to assert them in this case.

On November 29, 2004, the case proceeded to trial. At the conclusion of Charts' case-in-chief, Nationwide made an oral motion for judgment as a matter of law pursuant to Rule 50. The Court denied that motion without prejudice to Nationwide renewing it at the conclusion of all the evidence. Nationwide made a second motion for judgment as a matter of law at the conclusion of all the evidence. The Court reserved judgment until after the jury had reached its verdict. On December*363 10, 2004, the jury returned its verdict in favor of Charts on all three counts. On December 13, 2004, the Court entered judgment in accordance with the jury's verdict. On December 23, 2004, Nationwide renewed its request for judgment as a matter of law or a new trial by filing a motion with this Court. Both parties subsequently submitted numerous memoranda of law in response to Nationwide's motion.

On January 12, 2005, Charts filed a motion for attorney's fees and a motion for prejudgment interest. Those motions also have been fully briefed by the parties. The Court heard arguments on all post-trial motions on July 20, 2005.[4]

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[4] Nationwide filed its post-verdict motion for a judgment as a matter of law or, in the alternative, for a new trial, within the ten-day limitation set forth in Fed.R.Civ.P. 50(b). At that time, however, the transcript of

NATIONWIDE'S MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Nationwide's post-verdict motion seeks judgment as a matter of law as to all counts pursuant to Rule 50, or, in the alternative, a new trial on all counts and/or damages pursuant to Rule 59. The Court turns to the motion for judgment as a matter of law first.

I Motion for Judgment as a Matter of Law

A) *Standard of Review*

"If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment...." Fed.R.Civ.P. 50(b). When ruling on such a post-verdict motion for judgment as a matter of law, a district court may allow the judgment to stand, order a new trial or direct entry of judgment as a matter of law. *Id.*

A Court may properly grant a post-verdict Rule 50 motion when "there can be but one conclusion as to the verdict that reasonable men could have reached." *Merrill Lynch Interfunding, Inc. v. Argenti*, 155 F.3d 113, 120 (2d Cir.1998) (quoting *Samuels v. Air Transport Local 504*, 992 F.2d 12, 14 (2d Cir.1993)). In other words, "a Rule 50 motion for judgment as a matter of law must be granted

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this trial had not been completed. Consequently, the Court allowed the parties additional time beyond the date when the transcript was completed to file their memoranda.

where '(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.' " *Hernandez v. Keane*, 341 F.3d 137, 143-44 (2d Cir.2003) (quoting *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 132 (2d Cir.1986)). In making such a determination, a court "must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor." *Samuels*, 992 F.2d at 16. A court "cannot assess the weight of conflicting evidence, pass on the credibility of the witnesses, or substitute its judgment for that of the jury." *Id.* (quoting *Mattivi v. South African Marine Corp.*, 618 F.2d 163, 168 (2d Cir.1980)). Instead, a court "must defer to the credibility assessments *364 that may have been made by the jury and the reasonable factual inferences that may have been drawn by the jury." *Williams v. County of Westchester*, 171 F.3d 98, 101 (2d Cir.1999).

In considering the forgoing principles of law, it has been noted that the moving party bears a "heavy burden" on a post-verdict Rule 50 motion. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir.1994); *Matthews v. Armitage*, 36 F.Supp.2d 121, 124 (N.D.N.Y.1999); *see also Holt v. Home Depot, U.S.A. Inc.*, 2004 WL 178604 (D.Conn. Jan.22, 2004) (finding that the "stringent standards that apply to" a post-verdict Rule 50 motion were not met). Moreover, "[b]ecause a judgment as a matter of law intrudes upon the rightful province of the jury, it is highly disfavored." *Sabir v. Jowett*, 214 F.Supp.2d 226, 236 (D.Conn.2002) (quotations and citations omitted).

Nationwide's renewed motion for judgment as a matter of law challenges the jury's verdict on each count separately. Each argument will be addressed in turn.[5]

B) *Connecticut Franchise Act*

[3] ☑The jury found that Nationwide violated the Franchise Act when it terminated its contracts with Charts and CIAI, and Nationwide now challenges this finding on several grounds.

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[5] Nationwide does make one argument directed at all three counts, however: renewing the argument that it presented in its summary judgment papers, Nationwide's post-verdict Rule 50 motion argues that it is entitled to judgment as a matter of law on all three counts on the ground that Charts lacked standing because the claims were part of the bankruptcy estate. The Court rejected that argument when ruling on Nationwide's second motion for summary judgment. The Court need not revisit that decision at this time, however, because Nationwide failed to make this argument in its original pre-verdict Rule 50 motion for judgment as a matter of law. As the Second Circuit recently has noted, a party may only "renew" an earlier "request for judgment as a matter of law" in a post-verdict Rule 50 motion. *Broadnax v. City of New Haven*, 415 F.3d 265, 268 (2d Cir.2005); *see also See* Fed.R.Civ.P. 50 advisory committee's note (re 1991 Amendment, Subdivision (b)) ("A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion"); *Rand-Whitney Containerboard Ltd. Partnership v. Town of Montville*, 289 F.Supp.2d 62, 67 (D.Conn.2003) (A post-verdict Rule 50 motion "cannot assert new grounds; the rules limit the grounds for post-verdict judgment as a matter of law to those 'specifically raised' in the pre-verdict motion")(quoting *Lambert v. Genesee Hosp.*, 10 F.3d 46, 53-54 (2d Cir.1993)).The Second Circuit has indicated, however, "a [post-verdict] Rule 50(b) motion should not be granted [on a ground not raised previously] unless it is required to prevent manifest injustice." *Broadnax*, 415 F.3d at 268 (quotations omitted). Nationwide has not responded to Charts' argument that this issue was not properly raised in the pre-verdict Rule 50 motion, much less argued that the Court should address it to prevent a "manifest injustice." In any event, the Court finds that such a result will not occur, as the evidence at trial did not alter the Court's prior conclusion on the standing issue.

i) Jury Issue

Nationwide first claims that the Franchise Act claim should not have gone to the jury. The Court rejects this argument for several reasons. First, and most important, it was not raised in the pre-verdict Rule 50 motion. *See* *Rand-Whitney Containerboard Ltd. Partnership*, 289 F.Supp.2d at 67; *see also* footnote 5 of this ruling. Second, although Charts' complaint and jury demand was filed August 11, 1997, at no subsequent time did Nationwide object to the submission of the Franchise Act claim to the jury.[6] *See* *365 Fed.R.Civ.P. 39(a)(2) (allowing for a party to object to a jury demand). Indeed, although Nationwide made several objections to the Court's proposed instructions on the Franchise Act count at the charging conference, none addressed the underlying question of whether the Franchise Act claim should be submitted to the jury. Only now, after the matter already has been submitted to the jury and a plaintiffs' verdict returned, Nationwide raises its objection. The Court finds that such an objection has been waived.[7] *Compare* *Thompson v. Parkes*, 963 F.2d 885 (6th Cir.1992) (finding that the district court improperly found that the claims were equitable and took them from the jury one week *after* the jury had returned its verdict) *with* *Merex A.G. v. Fairchild Weston Sys., Inc.*, 29 F.3d 821, 822 (2d Cir.1994) (finding that the district court properly took an equitable claim from the jury at the close of evidence, *before* the case was

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[6] Because the jury demand did not specify which counts should be submitted to the jury, Charts was "deemed to have demanded trial by jury for all the issues so triable." Fed.R.Civ.P. 38(c).

[7] Nationwide also requests that the Court certify this question to the Connecticut Supreme Court. This request is also rejected as untimely, as this is the first time that Nationwide has made such a request.

given to the jury).[8]

Prior decisions from the Connecticut Supreme Court and the United States Court of Appeals for the Second Circuit buttress this conclusion. In *Associated Investment Co. Ltd. Partnership v. Williams Associates IV*, 230 Conn. 148, 162, 645 A.2d 505 (1994), the Connecticut Supreme Court held that plaintiffs were not entitled to a jury trial on CUTPA claims.[9] In a subsequently issued decision, however, that Court stated: "A party who wishes CUTPA issues to be tried to the court, therefore, need only move to strike such a case from the jury list. *If the parties fail to take such action, however, CUTPA issues may be tried to the jury.*" *Larsen Chelsey Realty Co. v. Larsen*, 232 Conn. 480, 490 n. 13, 656 A.2d 1009 (1995) (emphasis added).

The Second Circuit recently addressed a similar issue, which was also an issue of first impression in this circuit, namely "whether, where one party requests a jury trial on the lost wages issue [under Title VII] and the party's opponents fail to object, the court is permitted, because the

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[8] In addition, the Court notes that the pretrial order indicated that this case would be a jury trial, and that the jury would be comprised of nine jurors. At no time did Nationwide object to the pretrial order, or otherwise seek clarification that the Franchise Act claim would not be submitted to the jury. *See* Fed.R.Civ.P. 16(e) ("[a pretrial order] shall control the subsequent course of the action unless modified by a subsequent order"); *Cross & Cross Properties, Ltd. v. Everett Allied Co.*, 886 F.2d 497, 503 (2d Cir.1989) (noting that, although "total inflexibility is undesirable," a "pretrial order[ ] should not be changed lightly") (quoting Fed.R.Civ.P. 16(e) advisory committee notes and *Clark v. Pennsylvania R.R. Co.*, 328 F.2d 591, 594-95 (2d Cir.1964)).

[9] The Connecticut legislature subsequently amended CUTPA to provide a right to jury trial in such actions. *See* Conn. Gen.Stat. § 42-110g ("In any action brought by a person under this section there shall be a right to a jury trial...."); *Lorenzetti v. Jolles*, 120 F.Supp.2d 181, 187 (D.Conn.2000) (noting the legislature's response to *Williams Associates IV*).

opponents may be deemed to have consented, to submit the issue for a non-advisory jury determination." *Broadnax*, 415 F.3d at 271. The Second Circuit, adopting the positions taken by the Fifth and Seventh Circuits, held that "that when a party demands jury consideration of lost wages under Title VII and the party's opponent fails to object, Rule 39(c) permits the district court to submit the lost wages issue for a non-advisory jury determination." *Id.* at 272. The Second Circuit *366 concluded that the district court's submission of the issue of lost wages to the jury was not reversible error because "the [defendant] failed to object to sending the lost wages issue to the jury, despite [plaintiff]'s including in her Complaint the statement that '[t]he plaintiff claims trial by jury of the issues in this case.' " *Id.*

Although the Court believes that Nationwide has waived its objection to the submission of the Franchise Act claim to the jury, it nevertheless bears noting that there is no decision from the Connecticut appellate courts addressing the question of whether a Franchise Act claim may be submitted to a jury, or holding that a Franchise Act claim was improperly submitted to a jury. There are, however, conflicting trial court decisions on this issue. One judge on the Connecticut Superior Court has found that a plaintiff does not have a right to a jury trial on a Franchise Act claim. *Hartford Electric Supply Co. v. Allen-Bradley Co., Inc.*, 28 Conn. L. Rptr. 447, 2000 WL 1918005 (Conn.Super.Ct., Dec.18, 2000) ("[n]o Connecticut cases have accorded a right to trial by jury in a [Franchise Act] case"). A judge in this District, however, has submitted such a claim to a jury and entered judgment in accordance with that jury's verdict. In *Valentino v. S.B. Thomas, Inc.*, 2001 WL 34118029 (D.Conn., Oct.28, 2001), after a five-day trial, a jury found that there was a franchise agreement between the parties and that the defendants

had violated the Connecticut Franchise Act when it terminated the plaintiff's franchise and awarded the plaintiff $60,000 in damages. Although the defendants moved for judgment as a matter of law pursuant to Rule 50, it appears that their motion focused on the evidentiary support for the jury's findings, and it did not raise the preliminary issue of whether the Franchise Act claim should have been submitted to the jury. Judge Eginton denied the defendants' motion in its entirety, entered judgment in accordance with the jury's verdict, and awarded the plaintiff prejudgment interest and attorney's fees.

In any event, because Nationwide failed to timely raise this issue at any time during this litigation, much less in its pre-verdict Rule 50 motion, it is not a proper ground for a post-verdict Rule 50 motion for judgment as a matter of law.

ii) The Connecticut Insurance Code

Nationwide next argues that because insurance companies and their agents are subject to extensive regulation by the Connecticut Insurance Code, § 38a-702 *et seq.*, the Connecticut legislature could not have intended for insurance agents to also be protected by the Franchise Act. More specifically, Nationwide argues that because the legislature has failed to enact a "good cause" termination requirement within the Insurance Code, the legislature could not have intended for the "good cause" requirement set forth in the Franchise Act to apply to insurance agents. *See* Conn. Gen.Stat. § 42-133f(a). This argument was initially raised in Nationwide's Motion to Dismiss. *See* "Reply to Plaintiff's Objection to Defendant's Motion to Dismiss" [doc. # 15] at 2-4. The Court rejected that argument in its Ruling on the Motion to Dismiss [doc. # 6].

Counsel also briefly raised this issue in its initial Rule 50 argument.

The Court reaffirms its decision denying the Motion to Dismiss, and no evidence was presented at trial which alters the Court's conclusion that the Connecticut legislature did not intend to preclude insurance agents from invoking the protections of the Connecticut Franchise Act. The decisions from other jurisdictions cited by Nationwide to support its view that the Connecticut legislature intended its *367 franchise act to not cover insurance agents concern factual settings and legislative and regulatory schemes different from the Connecticut statutes and regulations. Also, Nationwide's catalogue of failed legislative attempts to impose a specified good cause termination requirement for insurance agents in Connecticut-submitted after trial was completed-shows no clear indication that the Connecticut legislature intended such preemption by the insurance statutes and regulations. Finally, Nationwide has not made a compelling argument in the absence of clear legislative intent why an insurance agent should not be protected by the Connecticut Franchise Act if a jury concludes that he or she otherwise meets the tests for a franchise relationship.

iii) Evidentiary Support

The Court instructed the jury that a "franchise" relationship exists only when both of two requirements are met:

(1) There must be an oral or written agreement or arrangement in which a franchisee is granted the right to engage in the business of offering, selling, or distributing services under a marketing plan or system prescribed in substantial part by a franchisor; and

(2) The operation of the franchisee's business pursuant to this marketing plan or system must be substantially associated with the franchisor's trademark, service mark, tradename, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate.

Nationwide claims that there was insufficient evidence before the jury to find in favor of Charts on the first element, and, therefore, it is entitled to judgment as a matter of law on the Franchise Act count (Nationwide does not challenge the jury's finding as to the second element).

As to the first element, the Court further instructed the jury as follows: "The first element has a two step inquiry. First, Charts must prove by a preponderance of the evidence that there was an oral or written agreement or arrangement in which it was granted the right to engage in the business of offering, selling, or distributing insurance policies offered by Nationwide." It is undisputed that Nationwide had entered into contracts with both Alex Charts and CIAI. Moreover, according to the parties' stipulation of facts, "Alex Charts was the President of Charts Insurance Associates, Inc. ('CIAI'), which was a Connecticut corporation *engaged in the business of selling and servicing* Nationwide insurance policies and other related products within the State of Connecticut." This stipulation was read to the jury and was also supported by other evidence at trial, including testimony from Ruben Gainey, Nationwide's Vice President and Regional Manager for New England, that an agent was in the business of selling and servicing Nationwide polices. (Trans.12/1/04, pg.109).[10] Therefore, this admission and

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[10] Gainey was initially unavailable to testify at trial, and, therefore, his deposition transcript was read into evidence, absent objection. At that time, the Court instructed the jury as follows: "Ladies and

the consistent evidence gave the jury sufficient evidentiary support for its finding that Nationwide had granted Charts and CIAI "the right to engage in the business of offering, selling, or distributing*368 services...." In addition, although not discussed by either party, the Court notes that the Franchise Act may apply if a party was granted a right to "engage in the business of *offering*" services. Although Nationwide disputes whether Charts had the ability to bind it to a policy of insurance, and therefore actually could "sell" such a policy, there is no dispute as to Charts' ability to "offer" Nationwide policies to customers, and to execute an initial, non-binding contract with customer. Moreover, as to Charts' ability to bind Nationwide to a policy of insurance, Charts testified that, based on his prior success with Nationwide, he was made a "plus agent," and therefore he did have the ability to bind Nationwide. (Trans.12/01/04, pg.36-37). In sum, there was substantial evidence from which the jury could have found that Charts satisfied the first step of the first element.

As to the second step of the first element, namely whether Charts offered, sold or distributed Nationwide policies pursuant to a marketing plan or system which was prescribed in substantial part by Nationwide, the Court instructed the jury as follows:

This requirement focuses on the amount of control exercised in the conduct of Charts' business as a significant factor in determining whether a franchise was

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Gentlemen of the jury, you will now be read a transcript of testimony given previously by a witness in this case who is now unavailable to testify in person at this trial. You are not to speculate as to why this witness is unavailable and you are to regard this testimony in the same way as if it were given at trial in person before you." Gainey testified by deposition during the Plaintiffs' case, and personally appeared to testify during the Defendants' case. (Trans.11/29/04, pg.62).

created. You should consider several factors to determine whether the control, if any, exercised by Nationwide over Charts rose to the level of a prescribed marketing plan or system. You should consider whether it was Nationwide or Charts that had the power to set the retail prices charged to Charts' customers. Price is perhaps the most fundamental aspect of a marketing plan, and the ability to set prices is quite indicative of a franchisor's control. However, fixing prices alone may not be determinative of a franchisor's control. You also should consider, for example, whether Nationwide had the power to control other aspects of operation of Charts' insurance agency, including its hours of operation, its days of operation, its advertising, its lighting, its sales quotas and its hiring. In addition, you should consider whether Nationwide provided Charts with such things as financial support and management training.

There is no precise formula as to how many of these factors must be present to find the level of control indicative of a franchise, or as to the weight each factor should be given in each case. Instead, *you should consider these factors and give each the weight you believe it deserves, considering the significance of each factor to the business relationship between Nationwide and Charts.* (Emphasis added).

As evidenced by that charge, the second step of the first factor is a balancing test, and the jury had considerable discretion to consider evidence concerning the business relationship between the parties. After reviewing the transcripts and the parties' memoranda of law, the Court is unable to find that, when exercising this discretion, the jury employed "sheer surmise and conjecture." *Hernandez*, 341 F.3d at 143-44. Indeed, there was considerable testimony from Mr. and Mrs. Charts, as well as other

Nationwide employees, that supports the jury's finding that Charts operated pursuant to a marketing plan or system prescribed in substantial part by Nationwide. For example, when asked if agents operated under a marketing plan prescribed by Nationwide, Gainey answered "yes." In addition, Gainey testified that Nationwide employed Agency Managers to ensure that agents met Nationwide's standards, that Nationwide provided agents with samples *369 to use as local advertisements and that Nationwide had to sign off on any use of the Nationwide logo in local advertisements. (Trans.12/1/05, pg.103-05). An Agency Manager that was assigned to the Charts franchise, Mark Kapatoes, testified that, as part of his job, he would "sit down with [the agents] and go through what they had in plans as far as advertising, *marketing,* really anything that you would do ... to run a good business." (Trans.11/30/2004, pg.47) (emphasis added).[11] In addition, in response to a question asking "in what sorts of matters would you act as a liaison between the agents and Nationwide," Kapatoes replied that, for example, "we would run through marketing plans." (*Id.* at 48) Although Nationwide contends that it presented evidence to refute a finding that Charts operated pursuant to a marketing plan or system subscribed in substantial part by Nationwide, the Court "cannot assess the weight of conflicting evidence" at this stage of the litigation. *Samuels*, 992 F.2d at 16; *Mattivi*, 618 F.2d at 168. Thus, Nationwide's post-verdict Rule 50 motion on this ground is denied.

iii) *"Good Cause" Shown*

Finally, Nationwide argues that, even if Charts was a franchise, it had "good cause" to terminate that franchise. *See* Conn. Gen.Stat. 42-133f(a). Specifically, Nationwide

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[11] Kapatoes was unavailable to testify at trial, and, therefore, his deposition transcript was read into evidence, absent objection.

contends that Charts violated the Connecticut Insurance Code by paying for the policies of at least two individuals, and, therefore, they had "good cause" to terminate him. As Charts notes in response, however, at no time during the trial did Nationwide introduce the appropriate provisions of the Insurance Code into evidence, or elicit testimony from any witness stating that the reasons underlying the termination of the franchise were violations of state law. Indeed, in the opening statement made by Nationwide's counsel, the jury was told that Nationwide "investigated the allegations that the Charts had engaged in [rebating]" and "conclud[ed] that he had violated *company policy and practice.*" In conformance with this opening statement, Nationwide failed to present any evidence to the jury that Charts had violated the provisions of the Insurance Code, and that this was the reason for his termination. It was not until after the evidence was concluded and when Nationwide filed a proposed supplemental jury instruction on the Insurance Code and rebating that this issue was raised before the Court. For that reason, the Court denied the supplemental request, and the provisions of the Insurance Code were never presented to the jury.

Moreover, the jury could have found that the evidence submitted by Nationwide on this ground was not persuasive. Nationwide's argument essentially is that because Alex Charts paid the premiums on policies for the policy holder, he engaged in illegal "rebating," and, therefore, it had "good cause" to terminate his franchise. There appear to be three incidents in which Alex Charts initially paid the premiums for the policy holder. In the first incident, Charts paid the $54 premium for the first year of a policy issued to Anne Elizabeth Turoczi, the niece of Missy Brayton, a woman who worked for CIAI. Although Brayton testified at trial that Charts had paid the premium on her niece's policy, she admitted on cross-

examination that she was unaware that her niece's parents had reimbursed Charts the full premium amount a short time thereafter, and a copy of the Turoczis' check to *370 Charts was submitted into evidence. (Trans. 12/2/04, pg. 137-38, and Plaintiffs' Ex. 81). Charts also testified that he was reimbursed for this advance of the Turoczi premium. (Trans.12/01/04, pg.48).

In the second incident, it appears that Charts paid some premiums on a $1,000,000 life insurance policy issued to Mario Boccarossa, his Nationwide Agency Manager at the time. At trial, Alex Charts testified that: "[W]hen [Boccarossa] came to me, I reminded him that I didn't want to get involved in paying any premiums. Okay. He was responsible for all the premiums. Okay. Like even when we started the policy, and he assured me that would be the case." (Trans.12/01/04, pg.61). Charts further testified that, although Boccarossa had paid some of the premiums a "few months" later, he was then replaced by Kapatoes as Agency Manager. Boccarossa asked Charts to pay some of the outstanding premiums, in the amount of $6,000, and "he would make it up as soon as he could." (Id). Although Boccarossa failed to pay that money back, Charts testified that he did not sue for the money because he didn't think he was at the "stage" to sue "his manager," and, moreover, "[it] wasn't enough money for me to bother pay[ing] a lawyer and going after." (Id. at 62).

In the third incident, Charts paid the first year premiums for two policies issued for the twin sons of Linda Mello, soon after Mello's husband had died. Mello was a secretary in Nationwide's district office, and she worked for both Kapatoes and Boccarossa when those individuals served as the Agency Manager for the Charts franchise. The total amount advanced by Charts' for those policies totaled $250. Although Mello never repaid that amount, she has

kept those policies active and has paid all of the remaining premiums herself. Charts testified that he expected to receive the advanced premium back from Mello, but that he did not "see any reason to chase her for it" and that he considered it a "charitable gift." (Trans.12/1/04, pg.45-46).

Nationwide may be correct in arguing that the evidence concerning these three incidents could provide the jury with enough evidentiary support for a finding that Nationwide had "good cause" terminate the franchise. However, the jury also had enough evidentiary support to find that there was not "good cause" for termination. For example, the termination letter sent by Nationwide to Charts, which was entered into evidence, fails to mention the "rebating" incidents as a ground for the termination. (Plaintiffs Ex. 49). In addition, other Nationwide employees testified that they had engaged in similar actions when selling Nationwide policies. Because a court "cannot assess the weight of conflicting evidence" at this stage of the litigation, *Samuels*, 992 F.2d at 16, the motion for judgment as a matter of law on this ground must be denied.

In sum, Nationwide's post-verdict Rule 50 motion for judgment as a matter of law on the Franchise Act count is denied.

C) *Connecticut Unfair Trade Practices Act*
Nationwide challenges the jury's finding on the CUTPA count on several grounds.

i) Applicability of CUTPA
CUTPA provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen.Stat. § 42-110b(a). Nationwide first argues that it is

entitled to judgment as a matter of law on the CUTPA count because the acts complained of by Charts did not occur "in the conduct of any trade *371 or commerce." Instead, Nationwide contends that the parties' relationship was similar to a traditional employer/employee relationship-to which CUTPA does not apply. *See Fenn v. Yale University*, 283 F.Supp.2d 615, 639 (D.Conn.2003) (citing cases).

CUTPA defines trade and commerce as "the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state." Conn. Gen.Stat. § 42-110a(4). Again, one of the facts stipulated to by the parties was that "Alex Charts was the President of Charts Insurance Associates, Inc. ('CIAI'), *which was a Connecticut corporation* engaged in the business of *selling* and *servicing* Nationwide insurance policies and other related products within the State of Connecticut." (emphasis added). This stipulation demonstrates that the plaintiffs are a Connecticut corporation and its president, not employees of Nationwide or similar to employees of Nationwide. Indeed, the jury specifically found that they were not employees when it found that the plaintiffs were Nationwide franchisees. Therefore, there was sufficient evidence from which the jury could have found that the acts complained of occurred in the conduct of trade or commerce. In so finding, the Court notes that the Connecticut state courts read CUTPA broadly, and the Connecticut Supreme Court has rejected the argument that CUTPA claims may only be brought by a consumer, and not a business. *See, e.g., Larsen*, 232 Conn. at 492, 656 A.2d 1009 ("CUTPA, by its own terms, applies to a broad spectrum of commercial activity," and, because it is "remedial in nature," it must "be liberally

construed in favor of those whom the legislature intended to benefit") (citations omitted). Therefore, the Court finds that the stipulated fact, as well as the evidence presented at trial conforming to that stipulation, provided the jury with a sufficient evidentiary basis for finding that the acts complained of occurred in "the conduct of any trade or commerce." § 42-110b(a).

ii) Evidentiary Support

Nationwide's next argument can be summarized as follows: (1) for the reasons set forth in its memorandum, it is entitled to judgment as a matter of law on both the Franchise Act count and the good faith and fair dealing count; (2) the CUTPA count is derivative of those two other counts; and, therefore (3) it is also entitled to judgment as a matter of law on the CUTPA count, as there is no other, independent basis for the jury's verdict. This argument is flawed, however, because the Court has found that Nationwide is not entitled to judgment as a matter of law on the Franchise Act claim. The jury was instructed that in order for it to find that Nationwide engaged in unfair or deceptive trade practices, it may find that "[t]he practices proved by Charts, without necessarily having been previously considered unlawful, *offend public policy as it has been established by statutes,* the common law, or otherwise-in other words, it is within at least the penumbra of some common law, *statutory,* or other established concept of unfairness." (emphasis added).[12] *372 Thus, a finding that Nationwide violated the

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[12] Further, the Court instructed the jury that it could find that Nationwide engaged in unfair or deceptive trade practices if "the practices proved by Charts are immoral, unethical, or unscrupulous" and "the practices proved by Charts cause unjustified, substantial injury to consumers, competitors, or other businessmen." The Court also instructed the jury that "a practice can be unfair under CUTPA because of the degree to which it meets one of the criteria or because, to a lesser degree, it meets all three."

Franchise Act, and the public policy expressed therein, could support a finding that Nationwide also violated CUTPA. *See* Hartford Electric Supply Co. v. Allen-Bradley Co., 250 Conn. 334, 368, 736 A.2d 824 (1999) (concluding that the trial court's properly found that the defendant had violated CUTPA, because "the defendant's conduct in attempting to terminate the plaintiff's franchise without good cause is a practice that offends the public policy of Connecticut to promote fairness among businesses behind the franchise act"). Consequently, the Court finds that the conduct underlying the Franchise Act count provided the jury with a basis for finding that Nationwide also violated CUTPA.[13]

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[13] Because the Court has found that the Franchise Act violation provides a sufficient evidentiary basis for the jury finding in regard to CUTPA, it need not reach the question of whether the jury's finding in regard to the implied covenant of good faith and fair dealing also could support a finding that Nationwide violated CUTPA.Alex Charts also alleged in his complaint that Nationwide discriminated against him on the basis of age and disability when it terminated his agency, thereby violating CUTPA. In its post-verdict Rule 50 motion, Nationwide argues that this claim was either abandoned by Charts or not supported by sufficient evidence. Because the Court has found that the jury's CUTPA verdict was supported by its finding on the Franchise Act, Nationwide's argument need not be addressed. The Court notes, however, that the instruction given to the jury did not include age or disability discrimination references. Finally, Nationwide claims that the allegations of "computer crimes" by Nationwide employees should not have been considered because that alleged conduct was outside of the limitations period. However, in its portion of the jury charge concerning unfair trade practices, the Court specifically instructed the jury that it could not consider "any actions taken by Nationwide or its employees prior to August 11, 1994 [three years before the suit was brought] on Charts' CUTPA claim." The evidence presented at trial of the "computer crime" concerned events in May, 1994. Thus, the jury could not have based its CUTPA decision on that evidence, in light of the charge.

In sum, Nationwide's motion for judgment as a matter of law on the CUTPA count is denied.

D) *Good Faith and Fair Dealing*

The jury found that Nationwide had violated the covenant of good faith and fair dealing implied into the parties' contracts. As with the previous counts, Nationwide advances several grounds upon which it claims it is entitled to judgment as a matter of law on this count. Each will be addressed in turn.

i) Good Cause for Termination

Nationwide first argues that the evidence adduced at trial conclusively demonstrates that it terminated its relationship with Charts for good cause, and, therefore, it is entitled to judgment as a matter of law. More specifically, Nationwide argues that, because it had good cause to terminate the franchise relationship under the Franchise Act, it also had good cause to terminate the parties' relationship for purposes of the implied covenant of good faith and fair dealing. The Court has rejected, however, Nationwide's argument that it is entitled to judgment as a matter of law on the issue of "good cause" under the Franchise Act. Consequently, its related argument concerning "good cause" under the implied covenant of good faith and fair dealing must also be rejected.

ii) No Good Cause Requirement

Nationwide next argues that it did not need to demonstrate good cause to terminate its contracts with Charts and CIAI, as both contracts provided that they were terminable "at any time after written *373 notice." More specifically, Nationwide argues that the implied covenant of good faith and fair dealing cannot incorporate a "good cause" termination requirement into the parties'

contracts because it would be counter to the express terms of those contracts. Charts argues that there was sufficient evidentiary support for the jury to find that, despite the language in the agreements, the parties' agreements contained an implied promise that they would only be terminated for good cause. The Court agrees with Nationwide, and finds that it is entitled to judgment as a matter of law on the implied covenant of good faith and fair dealing count.

In Connecticut the implied covenant of good faith and fair dealing cannot be used "to achieve a result contrary to the clearly expressed terms of a contract, unless, possibly, those terms are contrary to public policy." *Verrastro v. Middlesex Ins. Co.*, 207 Conn. 179, 190, 540 A.2d 693 (1988) (quoting *Magnan v. Anaconda Industries, Inc.*, 193 Conn. 558, 566, 479 A.2d 781 (1984)).

Charts presented the following evidence in support of the argument that, despite the plain language of the agreements, there was an implied promise that the agency would not be terminated without good cause: Gainey, who worked for Nationwide for over thirty-five years, testified; "I do not recall any agent being terminated without cause." (Trans.11/19/04, pg.100). Helena Charts testified that, in her experience, the types of things that lead to agents being terminated were taking clients' money or stealing. (Trans.11/30/04, pg.134).[14] Finally, Charts entered Nationwide's Agency Administration Handbook (the "Handbook") into evidence, which provides that company-initiated termination of an agency would be "primarily limited" to circumstances involving, *inter alia*, "criminal acts," "dishonesty or fraud" and "breach of contract," and that termination on non-enumerated grounds would be

[14] Helena Charts was unavailable to testify at trial, and, therefore, her deposition testimony was read into evidence, absent objection.

"rare." (Plaintiffs' Ex. 83, pg. 21). This Handbook also sets forth the procedure for the Agency Review Board, which was an internal Nationwide procedure for agents to appeal "problems which have not been solved to the agent's satisfaction." (Id. at 154).[15] None of this evidence, however, altered or amended the plain language of the parties' agency agreements, which provide that they are terminable "at any time after written notice." The testimony of Gainey and Helena Charts was based on their general experience, and failed to address the specific agreements between the Charts and Nationwide. Although the Handbook does seem to imply that a heightened standard will apply to possible agency terminations, it also states in bold type on the cover page that: "The contents of the Handbook are presented as a matter of information only. The only contractual matters are those expressed in your Agent's Agreement and specifically incorporated by reference made within that contract." (Id. at cover). It also provides that "[the] language used in this handbook is not intended to create nor it is *374 to be construed to constitute a contract between Nationwide and any or all of its employees, agents or officers." (Id.) Finally, the Court is not convinced that Nationwide's provision of an internal appeal process, the Review Board, serves to modify the termination language in the agency agreements, or imposes a good cause requirement for termination.

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[15] More specifically, the Handbook provides that: "The purpose of the Agent Administrative Review Board is to ensure mutual understanding and good communication between the agents and the Companies. To this end, the Review Board only hears one party at a time, does not permit attorneys for the Companies or the agent to attend, not is there any written or electronic record kept. These procedures have been developed over time to enhance and freely encourage the open communication by all participants as well as involvement of the members of the Review Board."

The Court finds that this evidence is insufficient to alter or amend the plain language of the parties' agreements. Consequently, Nationwide is entitled to judgment as a matter of law on this count.

E) *Conclusion*
Nationwide's motion for judgment as a matter of law [Doc. # 254] is **GRANTED** as to the implied covenant of good faith and fair dealing count, and **DENIED** as to the Franchise Act count and the CUTPA count.

II Motion for a New Trial
Nationwide next argues that it is entitled to a new trial pursuant to Rule 59.

A) *Standard of Review*
Fed.R.Civ.P. 59 provides, in relevant part, that: "A new trial may be granted to all or any of the parties and on all or part of the issues ... in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States...." Thus, a motion for a new trial may be based on, *inter alia,* an argument that "the trial was not fair to the party moving," or on "questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940).

"A motion for a new trial should be granted when, in the opinion of the district court, 'the jury has reached a seriously erroneous result or ... the verdict is a miscarriage of justice.' " *Song v. Ives Labs., Inc.,* 957 F.2d 1041, 1047 (2d Cir.1992) (quoting *Smith v. Lightning Bolt Prods., Inc.,* 861 F.2d 363, 370 (2d Cir.1988)). Unlike with a post-verdict Rule 50 motion for judgment as a matter of law, a

Rule 59 motion for a new trial "may be granted even if there is substantial evidence to support the jury's verdict ... [and] a trial judge hearing a motion for a new trial is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner." *Id.* (quotations and citations omitted). "A court considering a Rule 59 motion for a new trial must bear in mind, however, that the court should only grant such a motion when the jury's verdict is egregious.... Accordingly, a court should rarely disturb a jury's evaluation of a witness's credibility." *Sabir*, 214 F.Supp.2d at 244 (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 133 (2d Cir.1998)); *see also Dunlap-McCuller v. Riese Organization*, 980 F.2d 153, 158 (2d Cir.1992) ("the grant of a new trial on weight of evidence grounds should be reserved for those occasions where the jury's verdict was egregious").

Nationwide sets forth several arguments in support of its request for a new trial, each of which will be addressed in turn.

B) *Failure to Preclude Expert Testimony*
Nationwide first argues that the Court erred in permitting Charts' damages expert to testify as to the damages allegedly sustained by Charts. This argument, which was set forth in a footnote to its memorandum in support of its motion, merely cites to objections it raised previously*375 in the context of its pre-trial motion in limine to preclude the expert, John Allen Kosowsky, from testifying, as well as some of the relevant legal authorities. This footnote fails to raise any arguments that have not been considered by the Court previously. Consequently, to the extent Nationwide's motion seeks a new trial on the ground that Kosowsky should not have been permitted to testify as an expert, it is denied for the same reasons set forth in the

ruling on Nationwide's motion in limine. *See* Ford v. Nationwide Mut. Fire Ins. Co., 214 F.Supp.2d 11, 15-16 (D.Me.2002) (denying a Rule 59 motion because "the record supports my decision as gatekeeper under *Daubert, Kumho Tire,* and Evidence Rule 702 to let the jury hear his testimony and to let the jury decide what weight to give it. No more need be said").

C) *Insufficiency of the Evidence Concerning Damages*

Nationwide next argues that Kosowsky's testimony was insufficient to establish Charts' damages to a reasonable degree of certainty, and, therefore, it is entitled to a new trial on damages at the least. *See* Expressway Associates II v. Friendly Ice Cream Corp. of Connecticut, 218 Conn. 474, 476-77, 590 A.2d 431 (1991) ("It is axiomatic that the burden of proving damages is on the party claiming them.... When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty") (citations omitted). More specifically, Nationwide maintains that there were four major errors in the analytical method used by Kosowsky. Again, this argument already was presented to the Court through the pre-trial motion in limine, which was denied. Kosowsky's testimony at trial was fully consistent with the methodology at issue in the motion in limine. Moreover, Nationwide conducted a thorough cross-examination of Kosowsky at trial and highlighted what it claimed were deficiencies in his methodology and conclusions.[16] Because

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[16] For example, Nationwide argues that Kosowsky was unqualified as an expert on lost future earnings for Mr. Charts, and his resulting calculations of lost future earnings were flawed, because Kosowsky's experience primarily involved valuing businesses. Nationwide had an opportunity to present this argument to the jury, which was free to use it when determining what weight to give Kosowsky's testimony. *See, e.g.,* Bohus v. Beloff, 1991 WL 21654 (E.D.Pa.) (fact that expert witness had participated in "relatively few complete podiatric evaluations goes to the weight of his testimony and opinions, not to the

Kosowsky testified to a reasonable degree of certainty that Charts' damages were $2,316.857, and the jury awarded Charts actual damages of $2,300,000, it appears that the jury found Kosowsky credible, and credited his testimony accordingly.[17] The Court concurs with the jury's apparent credibility determination, and notes that Kosowsky's testimony at trial was more specific, detailed and informed than even anticipated, and fully supported the jury's finding concerning damages. *See* Song, 957 F.2d at 1047 ("a trial judge hearing a motion for a new trial is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner"). Therefore, Nationwide's motion for a new trial is denied. *See* Braun Elevator Co. v. Thyssenkrupp Elevator Co., 379 F.Supp.2d 993 (W.D.Wis.2005) ("the challenged factual determinations [of lost profits] were the subject of genuine factual dispute at trial and there was ample support for the jury to have resolved those disputes in plaintiff's*376 favor based on the evidence presented").

D) *Insufficiency of Jury Instructions*

Nationwide next argues that the Court's final instruction to the jury was insufficient because it: (1) failed to instruct the jury that Charts' admitted payment of the premiums for insurance policies for unrelated persons constituted "good cause" for termination; (2) failed to instruct the jury as to "the proper standard for finding the existence of a franchise" under the Franchise Act; and (3) failed to instruct the jury as to the "proper standard for 'good cause' " under the Franchise Act. These claims are all without merit. Nationwide was accorded ample time to review the Court's proposed jury instructions and was allowed to make objections to such instructions at the charging

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issue of his qualifications as an expert witness"), reversed on other grounds, 950 F.2d 919 (3d Cir.1991).

[17] Nationwide did not provide its own expert at trial.

conference. *See* Fed.R.Civ.P. 51(b)(2). To the extent that Nationwide already raised some of these objections at the charging conference, the Court considered them before issuing the final jury instruction and believes that they were properly decided at that time. As to the new objections to the jury instruction raised in Nationwide's Rule 59 motion, the Court believes that it fairly and accurately charged the jury on the appropriate law in this case and, therefore, finds the new objections to be without merit. Accordingly, Nationwide is not entitled to a new trial on the ground of improper jury instruction.

E) *Inconsistent Verdicts*

Finally, Nationwide argues that it is entitled to a new trial because the jury's verdict was inconsistent in that it found: (1) that Nationwide had acted in bad faith when it violated the implied covenant of good faith and fair dealing; yet also found (2) that Nationwide should not be held liable for punitive damages under CUTPA. Once again, any substantive merit to Nationwide's argument is precluded from consideration by the Court due to Nationwide's failure to raise a proper objection at an earlier stage of the litigation. Although not phrased as an attack on the sufficiency of the Court's instructions and verdict form, it is properly construed as such because both the instructions and the verdict form allowed the jury to find as it did. The Second Circuit recently construed a similar argument as an attack on the sufficiency of the instructions and verdict form:

> Although defendants frame their challenge to the verdict as a challenge to the sufficiency of the evidence, any problem with the verdict is a result of the charge and verdict sheet, which allowed the jury to find in favor of defendants on all of the common law claims, but also in favor of plaintiffs on the CUTPA claim.

Fabri v. United Technologies Intl., Inc., 387 F.3d 109, 121 (2d Cir.2004). Consequently, Nationwide was required to raise this objection to the verdict form and instructions, namely that they would permit an inconsistent verdict, prior to their submission to the jury. *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 56-57 (2d Cir.2002) ("When a charge or verdict sheet may lead to inconsistent verdicts, a party must object before the jury begins its deliberations") (citing Fed.R.Civ.P. 51). In addition, once the jury returned with the allegedly inconsistent verdict, Nationwide was required to raise its objection while that jury was still empaneled. *DiBella v. Hopkins*, 403 F.3d 102, 117 (2005) ("It is well settled that if a party does not challenge the consistency of jury verdicts while the jury is still empaneled, the objection is waived") (citing cases). At no time prior to their submission to the jury did Nationwide object to either the verdict form or the jury instruction on the ground that they would permit an inconsistent verdict. Indeed, Nationwide's proposed jury instructions*377 and verdict form fail to include any language that would guard against the allegedly inconsistent verdict reached by the jury. Moreover, once the jury returned its verdict, Nationwide failed to raise any inconsistency objection.

Even if this argument were properly before the Court, however, it would be rejected. The Court instructed the jury that, in order to award punitive damages, it must find that "Nationwide acted with reckless indifference to the rights of others or an intentional and wanton violation of those rights." As to "bad faith," however, the Court instructed the jury that: "Bad faith in general implies both actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested

or sinister motive. Bad faith means more than mere negligence; it involves a dishonest purpose." The Court does not interpret these standards as being harmonious, and believes that a jury could properly find that Nationwide's actions met the standard for "bad faith," yet did not meet the standard for punitive damages.

Moreover, as Charts notes in its opposition memorandum, the Court instructed the jury that if it found in favor of Charts on any of the claims, it "*may* also make a separate and additional award of punitive damages." (emphasis added). Consequently, even if Nationwide is correct that the standard for a finding of "bad faith" under the implied covenant of good faith and fair dealing and the standards for awarding punitive damages under both CUTPA and the common law are substantially similar, the jury's discretion to award punitive damages renders its inconsistency challenge meritless.[18] *See* Wright v. Hoover, 329 F.2d 72, 76 (8th Cir.1964) ("fixing damages is peculiarly a jury function"); *Lee v. Coss*, 39 F.Supp.2d 170, 172 (D.Conn.1999) ("It is well settled that calculation of damages is the province of the jury") (quoting Ismail v. Cohen, 899 F.2d 183, 186 (2d Cir.1990)); *see also* Bennett v. Rhodes, 34 Fed.Appx. 963 (5th Cir.2002) ("The failure to render an award of punitive damages does not render the jury verdict inconsistent, and Bennett does not otherwise persuade us that an award of punitive damages was compelled by the evidence"). Charts has not challenged the

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[18] The Supreme Court has instructed that a facially inconsistent verdict in a civil action is not an automatic ground for vacating the verdict, Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485, 53 S.Ct. 252, 77 L.Ed. 439 (1933), and that a court "must attempt to reconcile the jury's findings, by exegesis if necessary ... before [it is] free to disregard [them]." Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108, 119, 83 S.Ct. 659, 9 L.Ed.2d 618(1963).

jury's failure to award punitive damages in a post-trial motion.

Consequently, to the extent the motion for a new trial claims that the jury's verdict was inconsistent, it is denied.

F) *Remittitur*

Rule 59(e) also provides that a party may move "to alter or amend a judgment...." Therefore, "[w]hen a defendant's Rule 59 motion contests the size of a damage award, a court must decide whether or not the verdict is excessive ... If a district court finds that a verdict is excessive ... under the practice of remittitur [it] may condition a denial of a motion for a new trial on the plaintiff's accepting damages in a reduced amount ... It may not, however, reduce the damages without offering the prevailing party the option of a new trial." *Id.* (quotations and citations omitted). "A jury verdict is excessive if it *378 is so high as to 'shock judicial conscience.' " *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 136 (2d Cir.1993) (quoting *Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 567 (2d Cir.1988). In addition, "[a] damage award is excessive if it is the result of a miscarriage of justice and represents a windfall to the plaintiff without regard to [his] injury." *Sabir*, 214 F.Supp.2d at 245 (quoting *Oliver v. Cole Gift Ctrs., Inc.*, 85 F.Supp.2d 109, 114 (D.Conn.2000)). In other words, "[t]he court is 'not ... justified' in substituting its judgment for that of the combined experience of twelve jurors ... unless it conscientiously believe[s] that the jury has exceed the bounds of propriety." *Pace v. National R.R. Passenger Corp.*, 291 F.Supp.2d 93, 104 (D.Conn.2003) (quoting *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1329 (2d Cir.1990)).

Although Nationwide briefly requested that this Court order a remittitur in its original Rule 59 motion, it has

failed to address this issue in its subsequently filed memoranda of law. Rather, it has only challenged the damages award on the ground that Kosowsky's testimony failed to prove Charts' damages with reasonable certainty. Nationwide has not explained why, in the event that the Court finds that damages were proved with reasonable certainty, that the amount awarded was excessive. Consequently, Nationwide's request for remittitur is denied. *See* Broadnax v. City of New Haven, 2004 WL 491069 (D.Conn., Mar.2, 2004) ("The Court concurs with plaintiff's counsel that the issue of remittitur is not briefed, save for the heading, and the Court will not address this issue except to concur with the plaintiff that the sums returned by the jury are reasonable and consistent with the evidence, and reflect calm deliberation by the jury"), aff'd on other grounds, *Broadnax*, 415 F.3d at 265.[19]

Even if it were properly briefed and presented, however, the Court finds that the amount awarded by the jury had a proper factual basis and was not excessive as a matter of law. "It is well settled that calculation of damages is the province of the jury." *Lee*, 39 F.Supp.2d at 172 (quoting *Ismail*, 899 F.2d at 186). The jury heard the following evidence concerning Charts' alleged damages: testimony from Mr. Charts as to his prior income stream from his Nationwide franchise; testimony from Kosowsky as to how that income could be projected out into the future; and testimony from Gainey and Kapatoes as to how much income they had earned from Nationwide. Moreover, the jury heard counsel for Nationwide conduct thorough cross-examinations on the issue of damages, and, more particularly, on the issue of Charts' mitigation of his

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[19] *See also* Broadnax v. City of New Haven, 2005 WL 1691545 (2d Cir., Jul 20, 2005) (summary order analyzing several other issues raised on appeal that presented no novel questions of Second Circuit law)

damages. Nationwide, however, did not present its own damages expert. Given this testimony, the Court finds that that jury's decision to award Charts $2,300,000 in damages is adequately supported in the record, and that the amount awarded is not excessive as a matter of law. *Schneider*, 987 F.2d at 136 ("A jury verdict is excessive if it is so high as to shock judicial conscience"); *see also, Holt*, 2004 WL 178604 (defendant challenged, *inter alia,* the jury's "rejection of their argument on mitigation of damages"; the court found that "[e]ach of these decisions required findings of fact. The jury's findings in favor of the plaintiff may make their award seem generous in the eyes of [the defendant], but the award is not excessive as a matter of law, and must therefore be preserved").

*379 **III Conclusion**

Nationwide's motion for judgment as a matter of law or, in the alternative, motion for a new trial [Doc. # 254] is **DENIED** in part and **GRANTED** in part.

CHARTS' MOTION FOR ATTORNEY'S FEES

Charts has moved for attorney's fees based on the provisions for such fees set forth in the Franchise Act and CUTPA. More specifically, Charts seeks attorney's fees in the amount of $1,283.013.55 for work performed through December 31, 2004 and in the amount of $98,204 for subsequent work performed on the post-trial motions. Finally, Charts requests that the Court increase the award by doubling it due the nature and complexity of this case. In response, Nationwide contends that Charts' attorneys should be limited to the amount of attorney's fees established by the contingency fee agreement they entered into with Charts, and that no additional fees are warranted. In the event that the Court decides that Charts

is not limited to the contingency fee amount, Nationwide argues that the fees submitted by Charts' attorneys are excessive.

1) *Statutory Fee Provisions*

Connecticut follows the American Rule for attorney's fees, awarding fees only where explicitly permitted by the terms of a contract or a statute. *See, e.g.,* Doe v. State, 216 Conn. 85, 106, 579 A.2d 37 (1990); *Marsh, Day & Calhoun v. Solomon*, 204 Conn. 639, 653, 529 A.2d 702 (1987); *Lorenzetti v. Jolles*, 120 F.Supp.2d 181, 189 (D.Conn.2000). Both parties agree that an award of attorney's fees in this matter is permitted by both the Franchise Act and CUTPA. The parties dispute, however, the extent to which those statutes permit such an award. Moreover, the parties dispute whether attorney's fees should be awarded to Charts pursuant to the Franchise Act, CUTPA or both.

2) *The Franchise Act*

A franchisee bringing an action under the Franchise Act, "if successful, shall be entitled to costs, including, but not limited to, reasonable attorneys' fees." Nationwide concedes that, if its post-trial Rule 50 motion is denied, Charts is entitled to attorney's fees under the Franchise Act. *See, e.g., Virzi Subaru, Inc. v. Subaru of New England, Inc.*, 742 F.2d 677 (1st Cir.1984) ("The Connecticut [Franchise Act] provides that a franchisee who brings an action for substantive violations *is entitled* to reasonable attorney's fees 'if successful' ") (emphasis added) Nationwide argues, however, that such an award is limited to the amount established by the contingency fee agreement Alex Charts entered into with counsel. In response, Charts contends that a contingency fee agreement is only a floor, and not a ceiling, to a reasonable award of attorney's fees pursuant to the Franchise Act.

In *Sorrentino v. All Seasons Services, Inc.*, 245 Conn. 756, 717 A.2d 150 (1998), the plaintiff entered into a contingency fee agreement that called for his counsel to receive one-third of any recovery. Based on the jury's award, therefore, the appropriate award would have been $48,643.57. *Id.* at 773-74, 717 A.2d 150. The trial court reduced the award of attorney's fees to $30,000, however, based on its finding that the higher (one-third) amount was not justified by the billing records submitted by plaintiff's counsel. On appeal, the Connecticut Supreme Court reversed, holding that "a trial court should not depart from a reasonable fee agreement in the absence of a persuasive demonstration that enforcing the agreement would result in substantial unfairness to the defendant." *Id.* at 776, 717 A.2d 150.

*380 In *Schoonmaker v. Lawrence Brunoli, Inc.*, 265 Conn. 210, 828 A.2d 64 (2003), the Connecticut Supreme Court expanded on its decision in *Sorrentino,* concluding that:

[W]hen a contingency fee agreement exists, a two step analysis is required to determine whether a trial court permissibly may depart from it in awarding a reasonable fee pursuant to statute or contract. The trial court first must analyze the terms of the agreement itself ... If the agreement is, by its terms, reasonable, the trial court may depart from its terms only when necessary to prevent "substantial unfairness" to the party, typically a defendant, who bears the ultimate responsibility for payment of the fee ... By contrast, if the trial court concludes that the agreement is, by its terms, unreasonable, it may exercise its discretion and award a reasonable fee in accordance with the factors enumerated in rule 1.5(a) of the Rules of Professional Conduct.

Id. at 270-72, 828 A.2d 64 (citations omitted). Consequently, the Court reversed the judgment of the trial court, which had made an award of attorney's fees greater than called for by the terms of the contingency fee agreement, concluding that the trial court "violated both the spirit and the letter of *Sorrentino* by not giving the existing contingency fee agreement its due regard." *Id* at 272, 828 A.2d 64.

Therefore, pursuant to the teachings of *Schoonmaker* and *Sorrentino,* Nationwide argues that an award of attorney's fees to Charts under the Franchise Act is capped by the amount established by the contingency fee agreement. This argument was rejected previously by a judge in this District, however, in *Fabri v. United Techs. International, Inc.*, 193 F.Supp.2d 480, 484-85 (D.Conn.2002). In *Fabri,* the Court first distinguished the holding of *Sorrentino* on the ground that CUTPA, the statute at issue in *Fabri,* has important differences from § 31-290a, the statute at issue in *Sorrentino. Id.* at 484. Moreover, the Court found that, "[e]ven construing *Sorrentino* to apply to all state fee statutes, it holds at best that contingent fee agreements are a floor to a reasonable award." *Id.* at 484. After reviewing the policy behind *Sorrentino's* holding, the Court then noted that "[t]here is no parallel need to make contingent fee agreements into a ceiling to protect a plaintiff's jury award. As such, *Sorrentino* need not be extended beyond its facts as Defendants would do." *Id.* at 485. In *Schoonmaker,* the Connecticut Supreme Court explicitly noted that it "agree[d] with the recent characterization of *Sorrentino* by the United States District Court for the District of Connecticut" in *Fabri,* and quoted that Court's finding that, "[e]ven construing *Sorrentino* to apply to all state fee statutes, it holds at best that contingent fee agreements are a floor to a reasonable award." *Schoonmaker,* 265 Conn. at 271, 828 A.2d 64.

Consequently, the Court finds that the Connecticut Supreme Court's decisions in *Sorrentino* and *Schoonmaker* mean that a contingency fee agreement only limits the floor for an award of "reasonable" attorney's fees under statutes such as the Franchise Act, and do not limit the top range for such an award.

Accordingly, the bottom range of the award the Court "shall" make to Charts pursuant to the Franchise Act is the amount established by the contingency fee agreement Alex Charts entered into with his attorneys, which provides that his attorney's fee "will be one quarter (25%) of any recovery obtained in the case, after deduction of expenses, either by way of settlement, trial or appeal." At a minimum, this provisions requires an award of $575,000 ($2,300,000 x.25) pursuant to the *381 Franchise Act.[20] The question becomes, therefore, whether the Court should depart upwards from that agreement and award the full amount requested by Charts: $1,381,217.55, which was derived through Charts invoking the "lodestar" method of multiplying the reasonable hours worked by a reasonable hourly rate. *See, e.g.*, Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

As recounted in the introductory portion of this ruling, this case has a long and protracted history. Charts successfully challenged an adverse summary judgment ruling before the Second Circuit, obtained a favorable ruling on a second

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[20] Nationwide has not argued that, pursuant to *Schoonmaker*, the Court should award *less* than that amount in order to prevent it from suffering "substantial unfairness." For example, Nationwide has not argued that, because this was a three count complaint, an award of the full contingency fee under the Franchise Act fee provision would include fees for time that was not spent on the Franchise Act count, but rather was spent on either the CUTPA or the implied covenant of good faith and fair dealing count.

motion for summary judgment in this Court and obtained a favorable jury verdict at a trial conducted eight years after the case was initially filed. Given these factors, the Court finds that Charts is entitled to an attorney's fee award that is greater than the one provided for by the contingency fee agreement. In determining what amount is warranted, the Court has considered the twelve factors generally relevant to an award of reasonable attorney's fees that were first set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974):

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee for similar work in the community;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

See Hernandez v. Monterey Village Associates Ltd. Partnership, 24 Conn.App. 514, 517 n. 3, 589 A.2d 888 (1991) (adopting the *Johnson* factors); *see also* Steiger v. J.S. Builders, Inc., 39 Conn.App. 32, 38, 663 A.2d 432 (1995) (applying the *Johnson* factors in CUTPA context); Sabir v. Jowett, 214 F.Supp.2d 226, 249 (D.Conn.2002)) (applying *Johnson* factors after favorable jury verdict on 28 U.S.C. § 1983 claim and intentional infliction of emotional distress claim); Here, after consideration of those twelve factors, the Court awards Charts $750,000 in attorney's fees. This amount, although substantially higher that called for by the contingency fee agreement, also is substantially less than requested by Charts. The following factors were among those contributing to the Court's decision concerning the size of the award: Charts' request was based on current rates, rather than the rates billed at the time the work was conducted-which is some instances was ten years' prior.[21] Moreover, many of *382 the entries in the billing record appeared to be duplicative,

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[21] Nationwide's argument that the current fees submitted by Charts are excessive, however, is rejected. The current hourly fee charged by Attorney Garcia, Charts' lead attorney, is $375.00. Given the qualifications set forth in Attorney Garcia's affidavit, as well as this Court's observation as to the caliber of representation provided by him in this matter, this fee is not excessive. *See, e.g.*, Kaplan v. Gruder, 2000 WL 767679 (Conn.Super., May 25, 2000) (finding that a requested fee of $450 and $480 per hour, which were "the rates prevailing in New York City," are "are considerably different from the rates here in Connecticut," and, therefore, the attorney was only entitled to $350 per hour). Moreover, as Charts notes, this fee, as well as the others charged by Charts' attorneys, appears to be comparable to, or even less then, the fees charged attorneys at the firm representing Nationwide in this matter.

excessive or unrelated to this case. Charts' attorneys also set their recovery percentage at twenty-five percent in the contingency fee agreement, and this factor must be considered along with the remaining eleven *Johnson* factors. Nevertheless, the novelty and difficulty of the questions presented by this case, the skill required to perform the legal service properly, the amount involved and the results obtained and the experience, reputation and ability of the attorneys all counsel heavily in favor of an award above the contingency fee amount.

As the Court noted in *Fabri*, "[a] fee award is an obligation of a defendant to a plaintiff. A contingent fee agreement is an agreement between a plaintiff and his or her counsel, an agreement to which a defendant is not a party, and which should not be permitted to alter the purpose of the statutory award." The Franchise Act is a remedial statute, and courts read it accordingly. *See, e.g.*, *Hartford Electric Supply Co.*, 250 Conn. at 345, 736 A.2d 824 (the "[F]ranchise [A]ct's remedial purpose, to prevent a franchisor from unfairly exerting economic leverage over a franchisee, indicates that the statute should be read broadly in favor of the plaintiff"). The Franchise Act provides that a successful plaintiff is entitled to "reasonable attorney's fees," and, given the procedural history of this case, as well as all of the *Johnson* factors, an award of $750,000 represents "reasonable attorney's fees."

2) *CUTPA*

Charts also has moved for attorney's fees under CUTPA, which provides: "In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of

recovery." Conn. Gen.Stat. § 42-110g(d). As both parties recognize, an award of attorney's fees under CUTPA is discretionary. *See, e.g.,*; *Riggio v. Orkin Exterminating Co., Inc.*, 58 Conn.App. 309, 317, 753 A.2d 423 (2000) ("[t]he trial court *has discretion* whether to award attorney's fees under CUTPA") (emphasis added). Exercising its discretion, the Court finds that the same award of $750,000 also is appropriate under § 42-110g(d).

CUTPA explicitly provides that an award of attorney's fees must not be based on "the amount of recovery." § 42-110g(d). Thus, a contingency fee agreement does not limit the amount a court may award to a successful CUTPA plaintiff. *See, e.g., Fabri*, 193 F.Supp.2d at 484-85. Instead, the Court must look to the work "reasonably performed" by an attorney on the CUTPA claim, and claims related to the prosecution of the CUTPA claim, in order to determine a fee award. *Jacques All Trades Corp. v. Brown*, 57 Conn.App. 189, 200, 752 A.2d 1098 (2000). Turning the to the work performed by Charts' attorneys *383 in this case, the Court first notes that the factual basis for the CUTPA count and the Franchise Act count were inextricably intertwined, as evidenced by the Court's ruling on Nationwide's motion for judgment as a matter of law on the CUTPA count. More generally, this Court previously has stated: "Where a particular case involves several legal theories relating to a common core of underlying facts, a court need not analyze fees on a claim-by-claim basis, but instead 'should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.' " *Sabir*, 214 F.Supp.2d at 249 (quoting *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933). Thus, although Nationwide argues that Charts has not identified the work which was related solely to the CUTPA claim, the facts of this case made such a task very difficult. Consequently, the Court may

look to the total amount of effort expended by Charts' attorneys when determining what fee is appropriate under CUTPA.

In the section of this ruling addressing attorney's fees under the Franchise Act, the Court determined that an award of $750,000 accurately reflects the reasonable hours worked by Charts' attorney, and is based on a reasonable billing rate that is adjusted for present value, as well as affected by the other factors. Such an award limits billings submitted for duplicative, excessive or unrelated work, while at the same time recognizes that the complex and novel legal issues presented by this case required a significant amount of effort and billings. In sum, the Court finds that an award of $750,000 provides compensation for work "reasonably performed by [Charts'] attorney[s]" on this case.

C) *Multiplier*

Charts' counsel also requests that the award of attorney's fees be adjusted upwards by a multiplier of 2.0 due to the "extreme risk" they undertook in this case, the "superior" representation they provided and the "exceptional" results they achieved through the "unprecedented" jury verdict. *See* Hensley, 461 U.S. at 434, 103 S.Ct. 1933 ("other considerations ... may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained' "). Although the Court agrees that Charts' attorneys provided able representation, the Court nevertheless declines to double the attorney's fee award. All of the factors cited by Charts were considered by the Court in determining the "lodestar" amount to award, and they do not justify an additional enhancement. "The party asking the court to depart from the lodestar amount bears the burden of proving that such a departure is necessary to the calculation of a reasonable fee." *Evans v. State of*

Connecticut, 967 F.Supp. 673, 692 (D.Conn.1997). Charts has not met that burden here.

D) *Conclusion on Attorney's Fees*
In sum, whether made pursuant to the provision in the Franchise Act for attorney's fees, to the provision in CUTPA for attorney's fees or pursuant to both provisions, the Court finds that an award of $750,000 in attorney's fees to Charts is reasonable and appropriate.

E) *Costs*
Charts also has requested $30,341.41 in expenses incurred in the prosecution of this action, covering expenses such as copying costs, messenger fees and expert witness fees. Nationwide objects to the amount of expenses claimed by Charts, maintaining that there is no statutory basis for particular expenses submitted by Charts. As the Connecticut Supreme Court has explained: "It is a *384 settled principle of our common law that parties are required to bear their own litigation expenses, except as otherwise provided by statute ... Furthermore, because costs are the creature of statute ... unless the statute clearly provides for them courts cannot tax them." *M. DeMatteo Construction Co. v. New London*, 236 Conn. 710, 674 A.2d 845 (1996) (citations and quotations omitted).

Both the Franchise Act and CUTPA allow the Court to award Charts "costs," with the only difference being that the Court "shall" make such an award under the Franchise Act, and "may" make such an award under CUTPA. Of the $30,341.41 requested, $26,618.63 related to expenses incurred for items such as messenger services, copies, travel and court reporter services. Reviewing those expenses, the Court finds that they should be reduced by one third to eliminate duplicative, unrelated or

unnecessary expenses.[22] Therefore, the Court awards Charts $17,745.75 in costs pursuant to the Franchise Act and CUTPA. *See* *Gerner v. Applied Industrial Materials Corp.*, 2005 WL 1805670 at *10 (Conn.Super.Ct., June 30, 2005)(awarding forty percent of claimed costs for "readily understandable costs of litigation such as copying charges, delivery expenses and transcript costs"); *Bristol Technology, Inc. v. Microsoft*, 127 F.Supp.2d 64, 84 (D.Conn.2000) (awarding as "costs" pursuant to § 42-110g(d) for "disbursements for delivery services" and "[c] for travel, deposition transcripts, and expert witness fees").

The Court will not award Charts the requested $1,579.78 fee for Kitty Koenig, a "trial analyst" employed by the law firm representing Charts. The remaining portion of the requested amount, $2,143, was a fee paid to Kosowsky for his expert witness testimony. There is some dispute about whether fees paid to an expert accountant are recoverable under statutes such as the Franchise Act and CUTPA, as both of those statutes fail to define what "costs" are recoverable. More specifically, there is a dispute over whether any expert fee may be awarded under such statutes, or only fees paid to an expert listed in Connecticut's general fee provision statutes, Conn. Gen.Stat. §§ 52-257 and 52-260.[23] The Connecticut

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[22] For example, there are numerous entries for "Westlaw research," however there is no indication as to what this research was related to, which count it was related to or for what motion or stage of the litigation it related.

[23] Generally, Connecticut courts interpret "cost" provisions narrowly. *See* *M. DeMatteo Construction Co. v. New London*, 236 Conn. 710, 674 A.2d 845 (1996) (concluding that Conn. Gen.Stat. § 12-117a did not mention appraisal costs, and, therefore, such costs only allowable if provided by the general fee statutes §§ 52-527 and 52-560). In the context of fees for expert witnesses, the Connecticut Appellate Court has applied the teachings of *M. DeMatteo Construction Co.* and found that experts not listed in § 52-260 may not have their fees taxed as

Appellate*385 Court has held that such experts' fees are not within the "costs" provided by the CUTPA statute. *Miller v. Guimaraes*, 78 Conn.App. 760, 829 A.2d 422 (2003) (finding that the trial court improperly awarded taxable costs for the fees paid to an attorney serving as an expert on the legal fees that should be awarded to the plaintiff). This Court assumes that Connecticut courts would find the same as to permitted costs under the Franchise Act. Thus, no experts' fees will be awarded by virtue of the "costs" references in CUTPA and the Franchise Act.

In sum, the Court awards Charts $750,000 in attorney's fees and $17,745.75 in costs.

CHARTS' MOTION FOR PREJUDGMENT INTEREST

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costs. *Arnone v. Town of Enfield*, 79 Conn.App. 501, 831 A.2d 260 (2003) (reversing award of $6,479 in costs for payment of expert witness fees on the ground that, because § 31-51m does not expressly provide for expert witness fees, such fees may only be awarded if provided for in § 52-260(f), the Connecticut statute addressing fees for witnesses, and that an economist is not a listed expert witness whose cost may be reimbursed under § 52-260(f)); *Miller v. Guimaraes*, 78 Conn.App. 760, 829 A.2d 422 (2003) (concluding that the trial court improperly awarded a successful CUTPA plaintiff $1,000 as a taxable cost for an expert who was an attorney, as that type of expert was not covered by the provision for payment of expert witness fees in § 52-260). Those decisions, however, have been subject to criticism. *See, e.g.*, *Gerner v. Applied Industrial Materials Corp.*, 2005 WL 1805670 (Conn.Super.Ct., June 30, 2005) (citing cases, distinguishing *Miller*, and finding that the plaintiff was entitled expert fees as a "cost" pursuant § 42-110g(d), without regard to § 52-260); *see also Duerr v. Dicesare*, 37 Conn. L. Rptr. 909, 2004 WL 2361833 (Conn.Super., Oct 1, 2004) (disagreeing with *Miller*, yet "follow [ing] the rule set forth therein"); *Bristol Technology, Inc.*, 127 F.Supp.2d at 82 ("In state court, Conn. Gen.Stat. Sec. 52-257(b) provides for taxable costs. CUTPA, however, authorizes the award of costs over and above these taxable cost provisions").

Charts also has moved for prejudgment interest on the jury's award of $2.3 million in damages. It is well settled that "[w]hen the court's jurisdiction is based upon diversity, an award of prejudgment interest is governed by state law." *Brandewiede v. Emery Worldwide*, 890 F.Supp. 79, 82 (D.Conn.1994). The relevant Connecticut statute provides: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten percent a year, and no more, may be recovered and allowed in civil actions ... as damages for the detention of money after it becomes payable." Conn. Gen.Stat. § 37-3a.[24] However, this Court previously has found that, "[a]s such interest is an element of [the plaintiff's] damages, 'the determination of whether interest pursuant to § 37-3a should be awarded is a question for *the trier of fact.*' " *Neptune Group, Inc. v. MKT, Inc.*, 205 F.R.D. 81, (D.Conn.2002) (emphasis added) (quoting *Foley v. Huntington Co.*, 42 Conn.App. 712, 682 A.2d 1026 (1996)). Similarly, in *Retepromaca Representaciones Tecnicas Proyectos Y Sistemas, C.A. v. The Ensign-Bickford Co.*, 2004 WL 722231 at *8 (D. Conn., Mar 30, 2004), Judge Underhill concluded, "after a thorough review of relevant state and federal cases ... that the question of whether to award prejudgment interest pursuant to section 37-3a must be decided by the trier of

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[24] Charts also moved for prejudgment interest pursuant to 28 U.S.C. § 1961(a). As Nationwide notes in its memorandum in opposition, however, § 1961 only provides for postjudgment interest. *See* § 1961(a) (providing that "interest shall be calculated from the date of the entry of the judgment"); *Mobil Exploration & Producing North America, Inc. v. Graham Royalty Ltd.*, 910 F.2d 504 (8th Cir.1990) (in a diversity case, concluding that "28 U.S.C. § 1961 must be applied to calculate the rate of *post*-judgment interest")(emphasis added). Charts failed to respond to Nationwide's memorandum in opposition, and has not requested that this Court award postjudgment interest pursuant to § 1961. Consequently, the Court declines to construe Charts' motion as one seeking both pre and postjudgment interest.

fact-in this case the jury." Consequently, because the issue of prejudgment interest was not raised until after judgment had entered, and, therefore, was not charged to the jury, Judge Underhill rejected the plaintiff's argument that he had discretion to award such interest. Charts' attempt to distinguish those two cases, and the clearly established law that they rely on, is unpersuasive. Although Charts did request prejudgment interest pursuant to § 37-3a in the amended*386 complaint, the issue was not submitted to the jury for consideration. Indeed, Charts failed to raise that issue during trial, the charging conference or in a motion before the jury was discharged. Consequently, the Court is without the ability to award such damages, and the motion for prejudgment interest [Doc. # 260] is **DENIED**.[25]

CONCLUSION

1) Nationwide's motion for judgment as a matter of law or, in the alternative, motion for a new trial [Doc. # 254] is **DENIED** in part and **GRANTED** in part.

2) Charts' motion for attorney's fees [Doc. # 262] is **GRANTED**, and Charts is awarded $750,000 in attorney's fees and $17,745.75 in costs.

3) Charts' motion for prejudgment interest [Doc. # 260] is **DENIED**.

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[25] Nationwide also argues that prejudgment interest is not appropriate in this case because the jury's award of damages was not an award of "damages for the detention of money after it be[came] payable ...." § 37-3a. Rather, Nationwide claims it was an award for lost profits, as argued by Charts, and, therefore, it cannot support an award of prejudgment interest pursuant to § 37-3a. Because the Court has found that the question of prejudgment interest was not properly submitted to the jury, and such an award is therefore inappropriate, this argument need not be addressed.

SO ORDERED.

Charts v. Nationwide Mut. Ins. Co., 300 B.R. 552 (D. Conn. 2003) ("Charts II")

United States District Court,
D. Connecticut.
Alex CHARTS, et al., Plaintiffs,
v.
NATIONWIDE MUTUAL INSURANCE CO., et al.,
Defendants.
No. CIV.A.3:97CV1621(CFD).
Sept. 30, 2003.

Former Chapter 7 debtor asserted claims against insurance companies for breach of implied covenant of good faith and fair dealing, violation of the Connecticut Franchise Act, and violation of the Connecticut Unfair Trade Practices Act (CUTPA). The United States District Court for the District of Connecticut, Droney, J., adopting the recommendation of Garfinkel, United States Magistrate Judge, granted defendants' motion for summary judgment based on former debtor's alleged lack of standing to pursue these claims, and former debtor appealed. The Court of Appeals, 16 Fed.Appx. 44, vacated and remanded, with instructions to join bankruptcy trustee as indispensable party. On remand, the District Court, Droney, J., held that claims that accrued postpetition, when corporation that had entered into postpetition corporate agency agreement with Chapter 7 debtor allegedly breached that agreement while bankruptcy case was pending, was not sufficiently rooted in debtor's prebankruptcy past to be included in "property of the estate," though provision in corporate agency agreement purported to make agreement retroactive to date before bankruptcy petition was filed.

Motion denied.

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DRONEY, District Judge.

Pursuant to Fed.R.Civ.P. 56, the defendants, Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide Variable Life Insurance Company, and Colonial Insurance Company of California (collectively "Nationwide") filed a Motion for Summary Judgment and/or For Order Limiting the Issues to be Tried [Doc. # 127]. For the following reasons the defendants' motion is DENIED.

I. Background[1]

Plaintiff Alex Charts first entered into an insurance agent's agreement with Nationwide on February 1, 1979. Charts operated his insurance agency as a corporation named "Alex Charts Agency, Inc." In late 1992 or early 1993, around the time that Charts and his wife filed for personal bankruptcy, Charts formed "the Charts Insurance Agency, Inc." ("CIAI").[2] CIAI, which is also a plaintiff in this action, entered into a Corporate Agency Agreement with Nationwide on May 10, 1993. That agreement identified Charts as the principal of CIAI. The agreement also provided that it could be terminated by either party upon written notice, without cause.

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[1] The facts are taken from the parties Local Rule 9(c) statements and motion papers. (The Local Rules have been renumbered since the parties filed their papers. The new Local Rule number is 56). Disputed facts are indicated.

[2] The parties dispute the precise date on which this entity was formed, but agree that the Certificate of Organization and the First Biennial Report were filed with the Connecticut Secretary of State's Office on January 20, 1993.

On December 14, 1992, Alex Charts and his wife Helena filed their voluntary petition under Chapter 7 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Connecticut. On February 13, 1996, the Bankruptcy Court issued an Order of Discharge of Debtor, and the bankruptcy case was closed on March 1, 1996. The plaintiffs concede that the bankruptcy petition did not include any references to CIAI and that its existence was never raised in the bankruptcy proceedings, but they maintain that because CIAI was formed after the petition was filed, it need not have been disclosed. Charts did disclose his ownership of the shares of Alex Charts Agency, Inc. in his bankruptcy schedules.

By letter dated January 11, 1996, Nationwide cancelled the Corporate Agency Agreement with CIAI. After Charts requested an internal review of that decision, Nationwide's review board endorsed the termination. Charts and CIAI filed this action on August 11, 1997. The amended complaint [Doc. # 62] asserts three counts.[3] Count one alleges that in terminating*554 the Corporate Agency Agreement with CIAI, Nationwide breached its implied covenant of good faith and fair dealing. Count two asserts that the termination of the agreement was in violation of the Connecticut Franchise Act. Count three asserts that the termination resulted in a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen.Stat. §§ 42-110b, *et seq.* Nationwide's summary judgment motion addresses all three counts.

Before reaching the merits of the summary judgment motion filed by Nationwide, the Court will recount more of

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[3] This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1332, as there is complete diversity of citizenship between the opposing parties.

the procedural history of this case, particularly its intersection with the Charts' bankruptcy petition and discharge.

II. Additional Procedural History of this Case

On December 6, 1999, Nationwide filed its first motion for summary judgment [Doc. # 85] claiming that because Charts did not disclose the existence of CIAI in his bankruptcy proceedings, he did not have standing to pursue this lawsuit and should be judicially estopped from pursuing any undisclosed claim. On August 8, 2000, Magistrate Judge William I. Garfinkel issued a recommended ruling [Doc. # 97] granting the summary judgment motion and concluding that Charts' claims against Nationwide were part of the Charts' bankruptcy estate and as such could not be asserted here by Charts. On September 29, 2000, this Court approved, in part, the recommended ruling [Doc. # 102], over the plaintiffs' objection, and judgment entered for Nationwide [Doc. # 103].[4]

The plaintiffs appealed the ruling and judgment and on July 11, 2001, the Second Circuit issued a Summary Order remanding the case to this Court [Doc. # 110]. While not commenting on the merits of this Court's conclusion that the plaintiffs' claims were property of the bankruptcy estate, the Second Circuit held that the bankruptcy trustee was a necessary party in making such a determination. The mandate directed this Court "to vacate the judgment" and "reopen[ ] the proceeding and join[ ] the [bankruptcy] estate as a party." It further stated that "withdrawal of the reference would seem to be the most practical and expeditious way of handling the matter."

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[4] The Court did not approve that part of the decision which concluded that Charts was also precluded by the doctrine of judicial estoppel.

In accordance with the mandate, on July 12, 2002, this Court entered an Order [Doc. # 126] vacating its ruling on the motion for summary judgment. The Order also directed the Clerk of the Bankruptcy Court for the District of Connecticut to withdraw the reference in the Charts Bankruptcy case. Further, it directed the Clerk of this Court to add the bankruptcy estate as a plaintiff in this case, and directed the trustee of the estate to file an appearance.

On July 26, 2002, the defendants filed this motion for summary judgment [Doc. # 127], which closely mirrors their original motion. A hearing on the defendants' motion was held following the formal consolidation of this action with the bankruptcy action.

III. Summary Judgment Motion

In its new Motion for Summary Judgment [Doc. # 127], Nationwide asserts the same standing and judicial estoppel arguments that were the basis of the recommended*555 ruling on the first motion for summary judgment-that is, that Charts does not have standing to assert these claims, or that he is judicially estopped from asserting them, because he had not disclosed the existence of CIAI during the bankruptcy proceedings.

Nationwide also claims that, even if Charts has standing and is not judicially estopped from asserting these claims, it is entitled to summary judgment on the merits of the first, second, and third counts of the amended complaint. Regarding count one, Nationwide argues that its termination of CIAI cannot violate the implied covenant of good faith and fair dealing because the Corporate Agency Agreement expressly provides that it was terminable at

will by Nationwide. Regarding the Connecticut Franchise Act claims in count two, Nationwide asserts that, based on the undisputed facts, the Corporate Agency Agreement did not create a "franchise" and therefore that the plaintiffs do not fall within the Act. Finally, Nationwide asserts two independent bases for summary judgment on the plaintiffs' CUTPA claims in count three: 1) to the extent that it incorporates the earlier counts, it must fail "as they do" and 2) that the additional CUTPA violation alleged-involving a "computer crime"-is time-barred.

IV. Standard

In a summary judgment motion, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A court must grant summary judgment " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.' " *Miner v. City of Glens Falls*, 999 F.2d 655, 661 (2d Cir.1993) (citation omitted). A dispute regarding a material fact is genuine " 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.1992) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505). After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The Court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." *Aldrich*, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.1991); *see also Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780, 788 (2d Cir.1992).

V. Discussion

A. Property of the Estate

As noted above, the recommended ruling on the defendants' original motion for summary judgment, approved by this Court, found that the claims asserted by the plaintiffs here belonged to the bankruptcy estate of Alex Charts and his wife. Therefore, the Court held, the Charts' failure to disclose CIAI's existence and to list their claims on the schedule of assets in the bankruptcy proceeding deprived them of standing to pursue these claims here. The Second Circuit's Summary Order [Doc. # 110] remanding this case did not address the merits of this Court's determination that the claims were property of the *556 bankruptcy estate, but held that "the district court erred in adjudicating the property rights and claims at issue without joining the debtor's estate as a party." Summary Order, at 2.[5] After considering the parties'

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[5] At the hearing held after the estate was joined as a party, the estate's trustee, Attorney Richard Belford, indicated that he believed the claims raised by the Charts relating to CIAI were *not* properly part of the bankruptcy estate. Moreover, Belford indicated that if the Court were to again hold that these claims were part of the estate, he would seek to abandon them. If the claims had been abandoned by the estate, this issue would have been moot, because debtors are free to pursue claims that have been abandoned by the estate. *See Hutchins v. Internal Revenue Serv.*, 67 F.3d 40, 45 (3d Cir.1995) (holding that

arguments and the comments of the trustee, the Court will again consider the question of whether the claims asserted by the plaintiff were part of the bankruptcy estate.

1. Waiver of Standing Claim

The plaintiffs argue that by failing to raise issues of lack of standing, bankruptcy, and judicial estoppel in their first responsive pleading, Nationwide has waived those affirmative defenses, pursuant to Fed.R.CivP. 8(c). However, standing is an essential element of jurisdiction. *See* *In re Bennett Funding Group, Inc.*, 336 F.3d 94, 102 (2d Cir.2003) ("[S]tanding is an aspect of subject matter jurisdiction"); *Abortion Rights Mobilization, Inc. v. Baker*, 885 F.2d 1020, 1023 (2d Cir.1989) ("[W]hen a plaintiff lacks standing to bring suit, a court has no subject matter jurisdiction over the case."). Furthermore, it is well-settled that issues going to this court's subject matter jurisdiction can never be waived. *See The Herrick Co. v. SCS Communications, Inc.*, 251 F.3d 315, 333 (2d Cir.2001) ("Under these circumstances, the fundamental principle that the limits on federal subject matter jurisdiction cannot be waived, and may be challenged at any time, governs."). Therefore, the Court holds that Nationwide has not waived its objection based on standing by failing to raise it in its first responsive pleading. With regard to whether the defense of bankruptcy has been waived, the Court finds that the Charts' bankruptcy proceedings are not asserted as an affirmative defense. Rather, those proceedings are merely the factual predicate to

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debtor had standing to assert potential tax refund claim after the court granted the trustee's motion to abandon the claim). However, the estate did not abandon the claims, but instead sold any interest it had in the claims to Nationwide. Thus, if the Court were to hold that these claims were property of the estate, the Charts would not have standing to assert them because any claim owned by the estate is now held by Nationwide.

Nationwide's standing argument, which, as has just been noted, cannot be waived.

2. Plaintiffs' Standing[6]

"When a debtor files for bankruptcy protection, a bankruptcy estate is *557 created." *Polvay v. B.O. Acquisitions, Inc.*, No. 96 Civ. 3576(PKL), 1997 WL 188127, at *2 (April 17, 1997, S.D.N.Y.). The scope of the estate is defined at 11 U.S.C. § 541(a), which lists the property interests of the debtor that comprise the estate, and § 541(b), which provides for certain exclusions. It is undisputed that the Corporate Agency Agreement with CIAI was entered into in May of 1993-after the Charts' bankruptcy petition was filed-and that the alleged breach of that agreement by Nationwide occurred in January 1996-before the bankruptcy case was closed in March of 1996. Thus, the question for this Court is whether Chart's and CIAI's claims, which accrued after the petition was

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[6] Although the parties have not raised the issue, the Court notes that it has already decided, by adopting Judge Garfinkel's recommended ruling, that the plaintiffs' claims were property of the Charts' bankruptcy estate. While the Second Circuit's Summary Order [Doc. # 110] did not expressly overrule that determination, the Court retains the power to reconsider that decision, and will do so now. *See May Dep't Stores Co. v. International Leasing Corp.*, No. 88Civ.4300(CSH), 1995 WL 656986, at *2 (Nov. 8, 1995 S.D.N.Y.) (Under law of the case rules, "district courts retain discretion to reconsider, on remand, any issues that the Circuit Court did not 'expressly or implicitly decide.' ") (quoting *United States v. Stanley*, 54 F.3d 103, 107 (2d Cir.1995)). *See also Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 219 (2d Cir.2002) (law of the case a discretionary doctrine); *United States v. Uccio*, 940 F.2d 753 (2d Cir.1991) (under law of the case doctrine courts should adhere to prior decisions in same case, but while the rule "informs the court's discretion it does not limit the tribunal's power" to reconsider prior ruling). Moreover, the Second Circuit's mandate seems to contemplate a *de novo* review of the standing issue by this Court after hearing from the bankruptcy trustee.

filed, but before the case was closed and the Charts were discharged, constitute property of the estate under § 541. Section 541(a) provides, in relevant part, that

Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case....

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 541(a).

In the recommended ruling on the original motion for summary judgment, the Court relied on *Correll v. Equifax Check Servs., Inc.*, 234 B.R. 8 (D.Conn.1997), in which the Court held that, pursuant to § 541(a)(7), a Fair Debt Collection Act cause of action arising out of dunning letters received by the debtor after the bankruptcy petition was filed constituted property of the estate. *See Correll*, 234 B.R. at 10. Other courts have reached similar conclusions based on § 541(a)(7). *See Polvay*, 1997 WL 188127, at *2 ("Causes of action arising after the debtor files for bankruptcy generally become part of the estate."); *Stanley v. Sherwin-Williams Co.*, 156 B.R. 25 (W.D.Va.1993) (debtor did not have standing to maintain cause of action for interference of contractual relations which arose prior to the discharge of his estate); *In re Griseuk*, 165 B.R. 956, 957-59 (Bankr.M.D.Fl.1994) (holding that personal injury action arising during the pendency of the bankruptcy proceedings was property of the estate); *DeLarco v. DeWitt*, 136 A.D.2d 406, 408, 527 N.Y.S.2d 615 (N.Y.App.Div.1988) ("Upon the filing of a voluntary bankruptcy petition, all

property which a debtor owns or subsequently acquires, including a cause of action, vests in the bankruptcy estate."). However, other courts have held that post-petition, pre-discharge causes of action under similar circumstances are property of the debtor. *See* In re Durrett, 187 B.R. 413, 417-19 (Bankr.D.N.H.1995) (personal injury action arising post-petition did not become part of the bankruptcy estate); *In re Doemling*, 127 B.R. 954, 955-56 (W.D.Pa.1991) (tort claim arising out of post-petition automobile accident was property of the debtor, rather than the estate).

Taken together, these cases indicate that there may be no bright-line test for whether a cause of action that accrues post-petition will be included as part of the bankruptcy estate. Rather, in making such a determination, the Court should consider whether the cause of action "is sufficiently rooted in the pre-bankruptcy *558 past and so little entangled with the bankrupt's ability to make an unencumbered fresh start." *Doemling*, 127 B.R. at 957 (citing *Segal v. Rochelle*, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966) and noting that it is still controlling, despite the revision of the bankruptcy code in 1978) (internal quotations omitted).

For example, in *In re O'Dowd*, 233 F.3d 197 (3rd Cir.2000), the Third Circuit considered the relation of a post-petition legal malpractice claim to the debtor's pre-bankruptcy past:

[Debtor's] primary contention is that, since the [malpractice] Action is a post-petition tort claim, it can belong only to the debtor. She relies on caselaw in which courts have found that a debtor's post-petition cause of action did not constitute property of the estate [string cite omitted]. However, none of these cases involved claims

that could be traced directly to pre-petition conduct in the way [this claim] can be ... While we acknowledge that the conduct giving rise to the malpractice claim occurred post-petition, we find it conceptually impossible to sever [that action] from ... [debtor's] pre-bankruptcy dealings with [her attorney].

Id. at 203-04.

Here, in contrast to *O'Dowd,* the post-petition claims at issue did not involve matters that could be traced to the plaintiffs' pre-petition conduct. The gravamen for all the counts in the amended complaint is the alleged breach of the Corporate Agency Agreement on January 11, 1996.[7] The agreement was entered into on May 10, 1993 after the formation of the new insurance agency, and is not "rooted in the debtor's pre-bankruptcy past" (which ended with the filing of the petition in December 1992).[8] Even though

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[7] Although the First Amended Complaint refers also to the "Agency Agreement" of 1979 and an "Agent Corporation Agreement" of 1991, it appears that the plaintiffs are relying only on breaches of the Corporate Agency Agreement of 1993. To the extent that the plaintiffs are making any claims that predate the formation of CIAI or that do not relate to the 1993 agreement, those claims may very well be barred by the Charts' bankruptcy. That distinction is best left to the time of trial, however, in light of the plaintiffs' apparent reliance on post-petition causes of action.

[8] Moreover, Charts was free to enter into contracts in his individual capacity after the filing of the petition. Section 541(a)(7) explicitly refers to property acquired by the estate, as distinct from the debtor. As the court noted in *Doemling:*

Obviously, after the commencement of the case, the estate has an existence that is completely separate from that of the debtor. Section 541(a)(7) covers only property that the estate itself acquires after the commencement of the proceeding. Hence, there is absolutely no support for the ... claim that all the debtor's property, whether obtained pre- or post-petition, is property of the estate unless specifically excluded.

there is a provision in the Corporate Agency Agreement purporting to make the agreement retroactive to 1980, it is not the performance of the contract that is the subject of the plaintiffs' claims, but the *breach* of that agreement-an event that the parties do not dispute occurred, if at all, post-petition.

Therefore, the Court holds that the claims asserted by the plaintiffs are not property of the bankruptcy estate and the plaintiffs have standing to assert these claims.

B. Merits of the Summary Judgment Claim

The Court finds that there are genuine issues of material fact, including whether the relationship between the parties constituted a franchise, that preclude summary judgment on the plaintiffs' claims.

*559 **VI. Conclusion**

For the preceding reasons, the defendants' Motion for Summary Judgment and/or For Order Limiting the Issues to be Tried [Doc. # 127] is DENIED.

Doemling, 127 B.R. at 956.

Charts v. Nationwide Mut. Ins. Co, 16 Fed. Appx. 44, 2001 WL 682459 (2d Cir. 2001) ("Charts I")

United States Court of Appeals,

Second Circuit.
ALEX CHARTS AND CHARTS INSURANCE ASSOCIATES, INC., Plaintiffs-Appellants,
v.
NATIONWIDE MUTUAL INSURANCE COMPANY, Nationwide Variable Life Insurance Company, Colonial Insurance Company of California, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, and Nationwide Property & Casualty Company, Defendants-Appellees.
No. 00-9397.
June 15, 2001.

Present STRAUB, POOLER, Circuit Judges, and KORMAN, District Judge. [1]

SUMMARY ORDER

**1 AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the District Court is hereby VACATED and the case is REMANDED.

Plaintiffs-Appellants Alex Charts and Charts Insurance Associates, Inc. (collectively "Charts") appeal from a judgment of the United States District Court for the District of Connecticut (Christopher F. Droney, *Judge*)

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[1] Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

granting summary judgment to Defendants Appellees Nationwide Mutual Insurance Co., Nationwide Variable Life Insurance Co., Colonial Insurance Company of California, Nationwide Mutual Fire Insurance Co., Nationwide Life Insurance Co., and Nationwide Property & Casualty Co. (collectively "Nationwide"). The District Court adopted the recommendation of a United States Magistrate Judge (William I. Garfinkel, *U.S. Mag. Judge*) who recommended that the action be dismissed because, *inter alia,* the claims at issue were property of the bankruptcy estate of Mr. Charts.

We vacate the judgment without reaching the merits because the district court erred in adjudicating the property *46 rights and claims at issue without joining the debtor's estate as a party. Fed.R.Civ.P. 19 provides in relevant part that a person "should be joined as a party in the action" if "[he] claims an interest relating to the subject of the action and is so situated that the disposition of the action in [his] absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest...." Because of the compelling due process considerations that underlie Fed.R.Civ.P. 19, Wright, Miller, & Kane, Federal Practice and Procedure § 1602, pp 21-23, "[a]ny party may bring the issue to the court's attention, and both the trial court and the appellate court may take note of the nonjoinder of an indispensable party sua sponte." *Id.* § 1609 at pp. 138-39, and cases cited; *Manning v. Energy Conversion Devices, Inc.*, 13 F.3d 606, 609 (2d Cir.1994).

We raise this issue sua sponte, because the considerations of policy underlying Fed.R.Civ.P. 19 are implicated by

proceeding without the debtor's estate as a party. Nationwide argues that the very point of its effort to challenge Charts ownership of the cause of action was to avoid the possibility that it would be subject to multiple judgments-one by Charts in this action and one by the debtor's estate in a subsequent action. Post Argument Letter dated May 16, 2001, at p. 4. The possibility of multiple judgments arises from the fact "that a judgment is not res judicata as to, or legally enforceable against, a nonparty." *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). Joining the debtor's estate as a party avoids the possibility of multiple judgments.

On the other hand, because the debtor's estate is closed, a ruling that it is the owner of the cause of action may be of little practical consequence unless the bankruptcy proceeding is reopened and the estate is revived. Indeed, rather than protecting Nationwide against multiple judgments, the ruling that Charts does not own the cause of action could provide Nationwide with the windfall of protection against any judgment. Joining the debtor's estate as a party also avoids this incongruous result.

**2 Under these circumstances, the appropriate course is to vacate the judgment and remand the case to the district court with directions to withdraw the reference from the Bankruptcy Court for the purpose of reopening the proceeding and joining the estate as a party. Since the proceeding in the Bankruptcy Court is otherwise dormant, withdrawal of the reference would seem to be the most practical and expeditious way of handling the matter. We again emphasize that we express no view as to the proper owner of the cause of action or otherwise reach the merits of this dispute.

he judgment of the district court is vacated and the case s remanded for further proceeding consistent with this order.

Charts v. Nationwide Mut. Ins. Co., Order and Judgment Approving Recommended Ruling of the Magistrate Judge, (D. Conn. Sept. 29, 2000)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALEX CHARTS, ET AL.,
Plaintiffs.

v. Civil No. 3:97cv1621(CFD)

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.
Defendants.

ORDER

Upon review and pursuant to 28 U.S.C. §636(b)(1) and Rule 2 of the Local Rules for United States Magistrate Judges (D.Conn.) and following a de novo review of the portions objected to by the plaintiffs, the U.S. Magistrate William I. Garfinkel's Recommended Ruling granting Defendants' Motion for Summary Judgment [Document #97] is ACCEPTED in its entirety except for that portion of the opinion which concludes that the plaintiffs' claims are barred by the doctrine of judicial estoppel.[1]

Accordingly, the Clerk is ordered to close this case.

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[1] See Recommended Ruling at page 5. This aspect of the recommended ruling need not be decided in order to dispose of the Defendants' Motion for Summary Judgment. The Court expresses no opinion as to this argument in support of summary judgment, or the plaintiffs' arguments in opposition to summary judgment on this basis, or the plaintiff's objection to the recommended ruling alternatively granting summary judgment on this basis.

It is so ordered.

Dated at Hartford, Connecticut, this 29th day of September, 2000.

_____/s/_____
Christopher F. Droney
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALEX CHARTS, ET AL.,
CHARTS INSURANCE ASSOC., INC.

v. Civil NO. 3:97cv1621(CFD)

NATIONWIDE MUTUAL INSURANCE CO., NATIONWIDE FIRE INSURANCE, NATIONWIDE LIFE INSURANCE, NATIONWIDE PROPERTY, NATIONWIDE VARIABLE and COLONIA INSURANCE CO.

JUDGMENT

The action [illegible] for consideration of the defendant's Motion for Summary Judgment before the Honorable William I. Garfinkel, United States Magistrate Judge and the Honorable Christopher F. Droney, United States District Judge and,

The Honorable William I. Garfinkel having considered the full record of the case including applicable principles of law and having granted the Motion for Summary Judgment, and,

The court on September 29, 2000, filed an Order adopting and approving the Magistrate Judge's Recommended Ruling in its entirety, except for that portion of the opinion which concludes that the plaintiffs' claims are barred by the doctrine of judicial estoppel; it is therefore

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut, this 29th day of September.

KEVIN F. ROWE, Clerk

By_____/s/_____
Devorah Johnson
Depute Clerk

EOD 9/29/00

Charts v. Nationwide Mut. Ins. Co., Recommended Ruling on Motion for Summary Judgment, (D. Conn. Aug. 8, 2000)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ALEX CHARTS and CHARTS INSURANCE ASSOCIATES, INC., CIVIL ACTION NO. 3:97-cv-1621 (CFD)

Plaintiffs,

-against-

NATIONWIDE MUTUAL INSURANCE COMPANY, et al.,

Defendants.

RECOMMENDED RULING GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Fed. R. Civ. P., defendants Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide Property and Casualty Insurance Company, Nationwide Variable Life Insurance Company, and Colonial Insurance Company of California (collectively, "Nationwide") have moved for summary judgment and/or for an order limiting the issues to be tried. For the following reasons, defendants' motion for summary judgment (Doc. #85-1) is GRANTED and defendants' motion for an order limiting the issues to be tried (Doc. #85-2) is DENIED WITHOUT PREJUDICE.

BACKGROUND

A. The Parties' Relationship

Alex Charts entered into an insurance agent's agreement with Nationwide in 1979. Under the agreement, Mr. Charts was an independent contractor, and Nationwide reserved the right to cancel the agreement upon written notice. Until some time in 1993, Mr. Charts operated I's insurance agency under the trade name Alex Charts Agency, T . In October 1992, Mr. Charts formed Charts Insurance Associates, Inc. ("CIAI") as the successor to Alex Charts Agency, Inc. and filed formal incorporation papers for CIAI in January 1993. Mr. Charts then began conducting his insurance agency's business through CIAI. In May 1993, CIAI entered into a corporate agency agreement with Nationwide with a retroactive date of January 1, 1980. The agreement identified Mr. Charts as CIAI's principal and bound him to the agreement's terms. CIAI, like its predecessor, was an independent contractor subject to termination upon written notice, with or without cause. Nationwide canceled the agreement in January 1996; and after a review requested by Mr. Charts, the company's review board endorsed the termination.

Later in 1997, Mr. Charts and CIAI brought this action alleging contractual violations and violations of the state franchise and unfair trade practice statutes. The Nationwide defendants have moved for summary judgment. Nationwide maintains that because plaintiffs failed to disclose in their Chapter 7 bankruptcy action the existence of CIAI and the claims plaintiffs assert here, plaintiffs lack standing to pursue this lawsuit and are judicially estopped from pursuing previously undisclosed claims.

B. Plaintiffs' Bankruptcy

Mr. Charts filed a voluntary Chapter 7 petition in the District on December 14, 1992. This was after CIAI's formation and shortly before its formal incorporation. The petition identified Alex Charts Agency, Inc. as another name used by the debtor. The Bankruptcy Court issued an Order of Discharge in the name of "Alex Charts. . .dba Alex Charts Agency, Inc." *See* Freeman Aff. of 12/6/99, Ex. 7 (Doc. #88). A final decree entered on March 1, 1996 discharging the Trustee of the bankruptcy estate and closing the case. *See id.* Ex. 8.

In their bankruptcy case, plaintiffs represented that they had no franchises. *See* Sasso Aff. of 1/14/00, Ex. B, Chapter 7 Bankruptcy Petition (Doc. #93); *see also id* Ex. N, Charts Aff. of 1/14/00, ¶ 3. More significantly, they failed to disclose CIAI's existence, CIAI's status as the successor corporation, and the existence of the claims asserted in the instant case.

DISCUSSION

The summary judgment standard is well-known. A court may grant summary judgment only if it determines that there is no genuine issue of material fact based on a review of the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). If there is no genuine issue of material fact, the moving party is entitled to summary judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A court must also construe the facts in a light most favorable to the nonmoving party

and resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The issue of standing may properly be resolved by summary judgment. *See, e.g., Correll v. Equifax Check Servs., Inc.*, 234 B.R. 8, 11-12 (D. Conn. 1997).

The claims asserted by plaintiffs in this action arose after the filing of the bankruptcy petition and during the pendency of the bankruptcy case. However, plaintiffs, as noted above, failed to disclose CIAI's existence and failed to list the claims on the schedule of assets. Under similar facts, this Court has held that plaintiffs-debtors are without standing to pursue undisclosed claims which belonged to the bankruptcy estate. *See id.* As Judge Arterton explained in *Correll*, the unscheduled claim, even though it arose after the filing of the petition, was property of the bankruptcy estate under the Bankruptcy Code. *See* 234 B.R. at 10-11; *see also* 11 U.S.C. § 541(a)(7). The claims at issue vested in the bankruptcy estate, and absent abandonment, only the trustee could prosecute the claims as the real party in interest. *See Correll*, 234 B.R. at 10-11; *see also Tuttle v. Equifax Check Servs., Inc.*, 1997 WL 835055, No. 3:96-cv-948, at *2 (D. Conn. June 17, 1997) (Eginton, J.). As Nationwide , correctly notes, the fact that plaintiffs' agreements with Nationwide were property of the bankruptcy estate distinguishes this matter from cases involving claims belonging to the debtors alone. Moreover, plaintiffs' claims for damages stemming from Nationwide's termination of the agreements clearly fall outside any exemption for personal services. Plaintiffs' claims, in sum, fail for lack of standing.

In addition, plaintiffs' claims are barred by the doctrine of judicial estoppel. Judicial estoppel is "intended to protect

against a litigant playing fast and loose with the courts." *Insurance Co. of North America v. Della Indus., Inc.*, 998 F. Supp. 159, 162 n.1 (D. Conn. 1998) (citations omitted). The plaintiffs' failure to disclose in the bankruptcy case the existence of CIAI and their claims against Nationwide were clearly not inadvertent. In light of plaintiffs' affirmative duty to disclose these matters and the critical importance of such disclosure in bankruptcy actions, justice demands that plaintiffs be barred from pursuing the claims in this action. For such reasons, Judge Eginton found judicial estoppel appropriate in Tuttle. See 1997 WL 835055, at **2-3; *see also Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 936 (2000); *Donaldson v. Bernstein*, 104 F.3d 547, 556 (3d Cir. 1997) ("a bankruptcy disclosure statement. . .is at least a representation which in appropriate circumstances can serve as the basis for judicial estoppel").

CONCLUSION

For the foregoing reasons, the Nationwide defendants are entitle to judgment as a matter of law. Moreover, though the Court need not reach the issue, the defendants appear to be correct with respect to the unfair trade practices claim being time-barred. Consequently, defendants' motion for summary judgment (Doc. #85-1) is GRANTED. As the Court need not decide the motion to limit claims (Doc. #85-2), it is DENIED WITHOUT PREJUDICE.

This is a recommended ruling. Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10) days may preclude appellate review. *See* 28 U.S.C. § 636(b) (1); Fed. R. Civ. P.

72; D. Conn. L. Civ. R. 2 for Magistrate Judges; *FDIC v. Hillcrest Assocs.*, 66 F.3d 566, 569 (2d Cir. 1995).

So ordered this 8th day of August 2000, at Bridgeport, Connecticut.

__/s/_____
William I. Garfinkel
United States Magistrate Judge

Chartschlaa v. Nationwide Mut. Ins. Co., Order Denying Rehearing, (2d Cir. Oct 15, 2008)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Dennis Jacobs
CHIEF JUDGE

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 15th day of October two thousand and eight,

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Peter Chartschlaa and Angela Sawicki King as personal representatives of Alex Charts, deceased, doing business as Alex Charts Agency Inc. and Charts Insurance Associates, Inc.,

Plaintiffs-Appellees-Cross-Appellants,

v.

ORDER
No. 05-5988-cv(L)
05-6603-cv(xap)

Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Co., Nationwide Property and Casualty Company, Nationwide Variable Life Insurance Company and Colonial Insurance Company of California,

Defendants-Appellants-Cross-Appellees,

Helena Charts and Christopher L. Garcia,

Plaintiffs.

Appellee-Cross-Appellant, Peter Chartschlaa and Angela Sawicki King as personal representatives of Alex Charts, deceased, doing business as Alex Charts Agency Inc. and Charts Insurance Associates, Inc. having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc,

IT IS HEREBY ORDERED that the petition in denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By:_____/s/_____
Frank Perez, Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
OCT 15, 2008
Catherine O'Hagan Wolfe, Clerk

11 U.S.C. § 541(a)(1), Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541 (a)(6). Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

11 U.S.C. § 554(a). Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

Connecticut General Statutes § 33-637. Incorporation

(a) The corporate existence begins when the certificate of incorporation is filed.

(b) The Secretary of the State's filing of the certificate of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

Connecticut General Statutes § 42-110a. Definitions

As used in this chapter:

(1) "Commissioner" means the Commissioner of Consumer Protection;

(2) "Documentary material" means the original or a copy of a book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate;

(3) "Person" means a natural person, corporation, limited liability company, trust, partnership, incorporated or unincorporated association, and any other legal entity;

(4) "Trade" and "commerce" means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

Connecticut General Statutes § 42-110b. Unfair trade practices prohibited. Legislative intent

(a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

(b) It is the intent of the legislature that in construing subsection (a) of this section, the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 USC 45(a)(1)), as from time to time amended.

(c) The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act.

(d) It is the intention of the legislature that this chapter be remedial and be so construed.

Connecticut General Statutes § 42-110g. Action for damages. Class actions. Costs and fees. Equitable relief. Jury trial

(a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.

(b) Persons entitled to bring an action under subsection (a) of this section may, pursuant to rules established by the judges of the Superior Court, bring a class action on behalf of themselves and other persons similarly situated who are residents of this state or injured in this state to recover damages.

(c) Upon commencement of any action brought under subsection (a) of this section, the plaintiff shall mail a copy of the complaint to the Attorney General and the Commissioner of Consumer Protection and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the Attorney General and the Commissioner of Consumer Protection.

(d) In any action brought by a person under this section, the court may award, to the plaintiff, in addition to the relief provided in this section, costs and reasonable attorneys' fees based on the work reasonably performed by an attorney and not on the amount of recovery. In a class

action in which there is no monetary recovery, but other relief is granted on behalf of a class, the court may award, to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorneys' fees. In any action brought under this section, the court may, in its discretion, order, in addition to damages or in lieu of damages, injunctive or other equitable relief.

(e) Any final order issued by the Department of Consumer Protection and any permanent injunction, final judgment or final order of the court made under section 42-110d, 42-110m, 42-110o or 42-110p shall be prima facie evidence in an action brought under this section that the respondent or defendant used or employed a method, act or practice prohibited by section 42-110b, provided this section shall not apply to consent orders or judgments entered before any testimony has been taken.

(f) An action under this section may not be brought more than three years after the occurrence of a violation of this chapter.

(g) In any action brought by a person under this section there shall be a right to a jury trial except with respect to the award of punitive damages under subsection (a) of this section or the award of costs, reasonable attorneys' fees and injunctive or other equitable relief under subsection (d) of this section.

Connecticut General Statutes § 42-133e. Franchises: Definitions

As used in sections 42-133e to 42-133g, inclusive:

(a) "Person" means a natural person, corporation, limited liability company, partnership or other entity and, in case of an entity, includes any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors and other persons in active control of the activities of such entity;

(b) "Franchise" means an oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, provided nothing contained herein shall be deemed to create a franchisor-franchisee relationship between the grantor and grantee of a lease, license or concession to sell goods or services upon or appurtenant to the premises of the grantor, which premises are occupied by the grantor primarily for its own independent merchandising activities; and (2) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate, and includes any agreement between a manufacturer, refiner or producer

and a distributor, wholesaler or jobber, between a manufacturer, refiner or producer and a retailer, or between a distributor, wholesaler or jobber and a retailer;

(c) "Franchisor" means a person who grants a franchise to another person, including a manufacturer, refiner or producer or a distributor, wholesaler or jobber who grants to a distributor, wholesaler or jobber or retailer, as the case may be, the authority to use a trademark, tradename, service mark or other identifying symbol or name under a franchise;

(d) "Franchisee" means a person to whom a franchise is granted, including a distributor, wholesaler or jobber or retailer who is granted the authority under a franchise to use a trademark, tradename, service mark or other identifying symbol or name.

Connecticut General Statutes § 42-133f.
Termination, or cancellation of, or failure to renew a franchise

(a) No franchisor shall, directly, or through any officer, agent or employee, terminate, cancel or fail to renew a franchise, except for good cause which shall include, but not be limited to the franchisee's refusal or failure to comply substantially with any material and reasonable obligation of the franchise agreement or for the reasons stated in subsection (e) of this section. The franchisor shall give the franchisee written notice of such termination, cancellation or intent not to renew, at least sixty days in advance to such termination, cancellation or failure to renew with the cause stated thereon; provided, in the event the franchisor elects not to renew a franchise pursuant to subsection (e) of this section, the franchisor shall give the franchisee written notice of such intent not to renew at least six months prior to the expiration of the current franchise agreement. The provisions of this section shall not apply (1) where the alleged grounds are voluntary abandonment by the franchisee of the franchise relationship, in which event, such notice may be given thirty days in advance of such termination, cancellation or failure to renew, or (2) where the alleged grounds are the conviction of the franchisee in a court of competent jurisdiction of an offense punishable by a term of imprisonment in excess of one year and directly related to the business conducted pursuant to the franchise, in which event, such notice may be given at any time following such

conviction and shall be effective upon delivery and written receipt of such notice.

(b) If the franchise which is the subject of a notice of termination, cancellation or failure to renew provided for in subsection (a) of this section is operated on premises leased by the franchisor to the franchisee under a lease which terminates upon termination of the franchise, and if the franchisor seeks to terminate the lease, the notice shall be served upon the franchisee by a state marshal or indifferent person and shall expressly state that said lease shall terminate upon termination of the franchise, and shall further state that the franchisee may have certain rights under sections 42-133f and 42-133g, which sections shall be reproduced and attached to the notice.

(c) Upon termination of any franchise the franchisee shall be allowed fair and reasonable compensation by the franchisor for the franchisee's inventory, supplies, equipment and furnishings purchased by the franchisee from the franchisor or its approved sources under the terms of the franchise or any ancillary or collateral agreement; provided no compensation shall be allowed for personalized items which have no value to the franchisor.

(d) Notwithstanding the provisions of section 52-550, no franchise entered into or renewed on or after October 1, 1973, whether oral or written, shall be for a term of less than three years and for successive terms of not less than three years thereafter unless cancelled, terminated or not renewed pursuant to subsections (a) and (d) of this section.

(e) A franchisor may elect not to renew a franchise which involves the lease by the franchisor to the franchisee of real property and improvement, in the event the franchisor (1) sells or leases such real property and improvements to other than a subsidiary or affiliate of the franchisor for any use; or (2) sells or leases such real property to a subsidiary or affiliate of the franchisor, except such subsidiary or affiliate shall not use such real property for the operation of the same business of the franchisee; or (3) converts such real property and improvements to a use not covered by the franchise agreement; or (4) has leased such real property from a person not the franchisee and such lease from such person is terminated or not renewed.

(f) Any waiver of the rights of a franchisee under sections 42-133f or 42-133g which is contained in any franchise agreement entered into or amended on or after June 12, 1975, shall be void.

Connecticut General Statutes § 42-133g. Action for violation. Right to occupy franchise premises whose lease expires upon termination of franchise. Items filed with court by franchisor seeking possession of franchise premises

(a) Any franchisee may bring an action for violation of sections 42-133e to 42-133g, inclusive, in the Superior Court to recover damages sustained by reason of such violation, which action shall be privileged in respect to its assignment for trial and, where appropriate, may apply for injunctive relief as provided in chapter 916. [FN1] Such franchisee, if successful, shall be entitled to costs, including, but not limited to, reasonable attorneys' fees.

(b) A franchisee who leases real property under a franchise agreement, which lease expires upon termination of the franchise, and who receives notice from the franchisor in accordance with the provisions of subsections (a) and (b) of section 42-133f that such franchise is terminated, shall have no right or privilege to occupy the premises which are the subject of such lease, as of the date specified in such notice for the termination of such franchise, unless such franchisee is granted a temporary injunction in accordance with the provisions of chapter 916.

(c) A franchisor who applies to a court to obtain possession of premises leased by the franchisor to the franchisee upon termination of the franchise, which premises the franchisee has no right or privilege to occupy under

subsection (b) of this section, shall file with the court from which it seeks the order of possession: (1) An affidavit under oath from the clerk of such court, which affidavit shall state that the court records indicate that no temporary injunction has been granted to the franchisee, (2) the return of service of the notice required pursuant to subsection (b) of this section, (3) a copy of the notice served pursuant to subsection (b) of this section, and (4) an affidavit under oath, which affidavit shall state that the notice required by subsections (a) and (b) of section 42-133f, has been served, that the notice period required by said section has expired, and that no injunction to restrain termination has been issued.

Notice of Proposed Abandonment

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

In the Matter of)

Alex Charts) Bankruptcy Case
No. 3:02cv1647 (CFD)
Debtor)

NOTICE OF PROPOSED ABANDONMENT OF PROPERTY AND OPPORTUNITY FOR OBJECTIONS THERETO

To all creditors, indenture trustees and committees appointed or elected in this case pursuant to law:

In accordance with Rule 6007 of the Bankruptcy Rules, notice is hereby given of the proposed abandonment of the following described property:

The claims asserted by Alex Charts against Nationwide Mutual Insurance Company, Nationwide Variable Life Insurance Company, Colonial Insurance Company of California, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, and Nationwide Property & Casualty Company (hereinafter referred to as "Nationwide Insurance") in the litigation pending in the United States District Court for the District of Connecticut and bearing Docket Civil No. 3:97cv1621 (CFD).

In the opinion of the undersigned Trustee (and without taking any position with reference to the merits of these claims), these claims are not property of this bankruptcy estate, and therefore do not belong to this bankruptcy

estate. The reason for this is twofold, namely (a) that these claims arose post-petition, and are not rooted in pre-bankruptcy past, and (b) that these claims are "earnings from services performed by an individual debtor after the commencement of the case", and therefore, pursuant to 11 U.S.C. 541(a)(6) are excluded from being property of this bankruptcy estate.

The debtor's bankruptcy attorney affirms this position.

The undersigned Trustee has previously advised the Court in the aforesaid civil case of Charts v. Nationwide Insurance that the undersigned Trustee does not assert of claim any interest in said claims.

However, the undersigned Trustee has been added as a party plaintiff in that civil case, so it is necessary to abandon said claims as property of this bankruptcy estate because it is of inconsequential, if any, value to this bankruptcy case and ought to be abandoned pursuant to 11 U.S.C. 554.

Any person objecting to such abandonment of said property should give written notice of such objection to the Clerk at the United States District Court at 450 Main Street, Hartford, Connecticut 06103 no later than October 9, 2002 with a copy of such notice of objection to the undersigned Trustee. If any such objection shall be filed, a hearing thereon will be scheduled by the Clerk of the District Court. If no objections are received by the Clerk by the aforesaid date the Trustee will abandon said property as aforesaid.

Dated at New Haven, Connecticut this 18th day of September, 2002.

_____/s/_____
Richard Belford
Trustee

September 18, 2002

This is to certify that a copy of the foregoing Notice of Proposed Abandonment of Property and Opportunity for Objections Thereto was this day hand-delivered or mailed, postage prepaid, to the following:

1. Alex Charts, debtor herein, 170 Astoria Avenue, Bridgeport, CT 06606.
2. Brian E. Kaligian, attorney for the debtor, 771 Boston Post Road, Milford, CT 06460.
3. Office of the U.S. Trustee, District of Connecticut, One Century Tower, 256 Church Street, Suite 1103, New Haven, CT 06510.
4. All creditors listed on the mailing matrix attached hereto.

A courtesy copy was also sent to each of the following:

5. Chambers of Hon. Christopher F. Droney, United States District Judge, United States District Court, 450 Main Street, Hartford, CT 06103.
6. Garcia & Milas, attorneys for the Plaintiffs in litigation Case No. 3:97cv1621 (CFD), 44 Trumbull Street, New Haven, CT 06511, Attention: Attorneys Raymond A. Garcia, Warren F. Sasso, and Alfred A. DiVincentis, Jr.
7. Bingham McCutchen, attorneys for the Defendants in litigation Case No. 3:97cv1621(CFD), One State Street, Hartford, CT 06103, Attention: Attorneys Jonathan B. Alter, G. Eric Brunstad, Jr., Deborah S. Freeman, and James Scott Rollins.
8. Nelson, Kinder, Mosseau & Saturley, attorneys for the Defendants in litigation Case No. 3:97cv1621 (CFD), 99

Middle Street, Manchester, NH 03101, Attention: Attorney Catherine A. Blanchard.

/s/
Richard Belford
Trustee

United States Trustee
James English Bldg
105 Court St
New Haven, CT 06511

Bank of Boston Connecticut
100 Pearl Street
Hartford, CT 06103

Cardiology Hospital Services
1130 East Desert Inn Rd #200
Las Vegas, NV 89109

Charles Beckman Swanson Arctec
155 East Street
New Haven, CT 06511

Chase Manhattan Bank
802 Delaware Avenue
Wilmington, DE 19801

Choice Visa
P.O. Box 352
Baltimore, MD 21203

Connecticut National Bank
777 Main Street
Hartford, CT 06115

Consolidated Asset Recovery
Agent for FDIC (Cititrust)
961 Main Street
Bridgeport, CT 06604

David Feldman, Esq.
Zeisler & Zeisler
558 Clinton Avenue
Bridgeport, CT 06605-0186

Desert Palace, Inc.
DBA Caesar's Palace
3570 Las Vegas Blvd South
Las Vegas, Nevada 89109

DiPietro, Kantrovitz, & Browns
c/o Andrew M. DiPietro
45 Court Street
New Haven, CT 06511

Discover Card
c/o Greenwood Trust Company
PO Box 6011
Dover, DE 19903-6011

Euane Feldman & Boyer, P.C.
261 Bradley Street
P.O. Box 1694
New Haven, CT 06507-1694

Fairfield First Bank & Trust
2000 Post Road
Fairfield, CT 06430

First Madison Leasing
P.O. Box 1970

New London, CT 06320

Fred A. D'Albero
Delta Com Corp.
545 Main St.
East Haven, CT 06512

Gateway Bank
30 Main Street
Danbury, CT 06810

Gerardo Canto
523 Norton Parkway
New Haven, Ct 06511

Hogan, Rini & Mednick PC
Whitney Grove Square, 7th Fl
2 Whitney Avenue
New Haven, CT 06510

HouseHold
Credit Services, Inc.
P.O. Box 81622
Salinas, CA 93912-1622

Humana Hospital – Sunrise
P.O. box 98531
Las Vegas, NV 89193

Ingram & Associates, Inc.
P.O. Box 305017
Nashville, TN 37230-5017

Internal Revenue Service
Andover, MA 05501

John Garcia
c/o RA Civitello Co.
125 Bradley Road
Woodbridge, CT 06525

Liberty Bank for Savings
315 Main St.
P.O. Box 2700
Middletown, CT 06457

Limited Partners of Hughes
c/o Consultant Property Mngt.
1400 Old Country Road Ste 401
Westbury, NY 11590

Louis of Boston
234 Berkley Street
Boston, MA 02116

Mercy Ambulance
c/o Collection Bureau Central
2355 Red Rock Street Ste. 200
Las Vegas, NV 89126

Miguel Martinez
5 Park Place
Meriden, CT 06450

People's Bank
850 Main Street
Bridgeport, CT 06604

People's Credit Card Plan
P.O. Box 10311
Stamford, CT 06904

Peoples Federal Savings Bank
PO Box 36
Brighton, MA 02135

Pulmonary Specialists of NV
3720 Howard Hughes Parkway #10
Las Vegas, NV 89109-0937

Raymond Garcia, Esq.
44 Trumbull Street
New Haven, CT 06510

Richard & Jean Johnson
51 Maplevale Drive
Woodbridge, CT 06525

Richards of Greenwich
350 Greenwich Avenue
Greenwich, CT 06830

Shawmut Home Bank
433 South Main St.
West Hartford, CT 06110

Smith Barney
333 West 34th St.
New York, NY 10001

SNET
c/o David S. Doyle, Esq.
49 High Street
East Haven, CT 06512

State of Connecticut
Dept. of Revenue Services
92 Farmington Avenue

Hartford, Ct 06105

The Optima Card
P.O. box 45200
Jacksonville, FL 32232-5200

Thomas L. Kanasky, Jr.
180 Fairfield Ave.
Bridgeport, CT 06604

Town of Stratford
Tax Assessors Office
Main St.
Stratford, CT 06497

Trump Plaza Associates
DBA Trump Plaza Hotel & Casino
The Boardwalk at Miss Ave.
Atlantic City, NJ 08401

Union Trust Company
PO Box 7024
Bridgeport, CT 06601-7024

IRS
Special Procedures
Stop 155
Hartford, CT 06505